

Dated: May 31, 2016

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

CONTOUR IP HOLDING, LLC and	)	
ION WORLDWIDE, INC.,	)	
	)	
Plaintiffs,	)	C.A. No. 15-1108-LPS-CJB
v.	)	
	)	
GOPRO, INC.	)	<b>CONFIDENTIAL –</b>
	)	<b>FILED UNDER SEAL</b>
	)	
Defendant.	)	

**UNOPPOSED MOTION TO REDACT LIMITED PORTIONS OF THE  
APRIL 19, 2016 HEARING TRANSCRIPT**

Plaintiffs Contour IP Holding, LLC (“CIPH”) and iON Worldwide, Inc. (“iON”) (collectively, “Plaintiffs”), by and through their undersigned counsel, pursuant to Rule 5.2 of the Federal Rules of Civil Procedure and this Court’s policy on the electronic availability of transcripts of court proceedings, hereby move for an Order redacting certain highly confidential portions of the hearing transcript from the hearing held on April 19, 2016 (D.I. No. 41). Plaintiffs’ proposed redactions are narrowly tailored and apply only to particularly sensitive confidential information relating to private negotiations between iON and third-party Contour, LLC and between iON and CIPH. There is no public benefit to making this confidential information publicly available. Thus, for the reasons set forth below, Plaintiffs respectfully request that the Court grant Plaintiffs’ motion to redact the hearing transcript with respect to Plaintiffs’ and Contour, LLC’s confidential information. Pursuant to D. Del. LR 7.1.1, counsel for Plaintiffs has conferred with counsel for Defendant GoPro, Inc. (“GoPro”), and GoPro does not object to the redaction of information.

## **I. BACKGROUND**

The Court held a hearing on April 19, 2016 to hear oral argument on two GoPro motions to stay—one motion to stay pending *inter partes* review of some of the patent claims and the other relating to Federal Rule of Civil Procedure 41(d)—as well as to conduct a scheduling conference. During the argument on the motions, the Court requested information regarding the status of iON and Contour, LLC’s merger. Certain portions of the hearing transcript relating to the merger relate to confidential communications and negotiations between iON and third-party Contour, LLC and between iON and CIPH.

The official transcript of the hearing was filed on April 29, 2016, and Plaintiffs filed a notice of intent to redact material on May 20, 2016. The Court set the deadline for submitting redaction requests as May 31, 2016. Attached as exhibit A is a copy of portions of the transcript with the proposed redactions highlighted, and attached as Exhibit B is a redacted copy of the full transcript.

## **II. LEGAL STANDARD**

Federal Rule of Civil Procedure 26(c) provides that a protective order may be entered for good cause, including “requiring that a trade secret or other confidential . . . commercial information not be revealed or be revealed only in a specified way.” Fed. R. Civ. P. 26(c)(1)(G). Likewise, Rule 5.2(e) allows a court to require redaction of additional information or limit or prohibit a nonparty’s remote electronic access to a document filed with the court.

To determine whether “good cause” to seal exists, a court may look to a number of things, including (1) whether disclosure will violate any privacy interests; (2) whether the party benefiting from the order of confidentiality is a public entity or official; and (3) whether the case involves issues important to the public. *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995). “[I]f a case involves private litigants, and concerns matters of little legitimate public

interest, that should be a factor weighing in favor of granting or maintaining an order of confidentiality.” *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 788 (3d Cir. 1994).

The Third Circuit has explained that good cause to seal a transcript “is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure.” *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) (citing *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 529 F. Supp. 866, 890 (E.D. Pa. 1981)).

### III. ANALYSIS

Here, Plaintiffs seek a narrowly drawn protective order to cover only confidential information relating to private negotiations between iON and third-party Contour, LLC and between iON and CIPH. Rather than try to seal information about the merger of the two and the licensing negotiations generally, Plaintiffs seek to redact specific information related to the negotiations taking place since the merger was made public. *See* D.I. 41 at 51:6-8, 52:2-8, 57:14-21 (attached as Exh. A).

There is no public interest in publicly providing the information Plaintiffs request to be sealed, let alone any strong public interest. Indeed, this case involves private litigants and not public figures, weighing in favor of maintaining confidentiality. *Pansy*, 23 F.3d at 788. There is no benefit to the public in knowing about the private negotiations between iON and Contour, LLC or between iON and CIPH. And Plaintiffs’ and Contour, LLC’s confidential negotiations has nothing to do with public health or safety, factors that might otherwise weigh in favor of public accessibility.

On the other hand, there is a specific and serious potential for harm to Plaintiffs and Contour, LLC if their confidential information is disclosed. The portions Plaintiffs request to redact contain information not publicly available and intended to remain in confidence as Plaintiffs and third party Contour, LLC work to resolve their separate disputes. Plaintiff iON and

Plaintiff CIPH, which is co-owned by iON and Contour, LLC, would therefore be put at a disadvantage if the public became aware of the extent and nature of the negotiations between iON and Contour, LLC and between iON and CIPH before such agreement is final.

Plaintiffs have made every attempt to keep their proposed redactions limited to only the most sensitive information. Plaintiffs' proposed redactions do not prejudice GoPro or obscure the thrust of the stay motion arguments from the public. Plaintiffs therefore submit that they have shown the requisite "good cause" under Rule 26(c) for sealing those portions of the transcript relating to the Plaintiffs' and third-party Contour, LLC's private communications and negotiations.

#### **IV. CONCLUSION**

Plaintiffs respectfully request that this motion to redact certain confidential information regarding Plaintiffs and Contour, LLC's private communications and negotiations be granted.

Respectfully submitted,

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Dated: May 31, 2016

**EXHIBIT A**

**REDACTED IN**

**ITS ENTIRETY**

# EXHIBIT B

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

CONTOUR IP HOLDING, LLC,)
 And iON WORLDWIDE, INC.,)
 )
 Plaintiffs, ) C.A. No. 15-1108-LPS-CJB
 )
 v. )
 )
 GoPRO, INC., )
 )
 Defendant. )

Tuesday, April 19, 2016  
1:30 p.m.  
Courtroom 2A

844 King Street  
Wilmington, Delaware

BEFORE: THE HONORABLE CHRISTOPHER J. BURKE  
United States District Court Judge

APPEARANCES:

SHAW KELLER, LLP  
BY: KAREN ELIZABETH KELLER, ESQ.

-and-

ROPES & GRAY, LLP  
BY: PAUL M. SCHOENHARD, ESQ.  
BY: NICOLE M. JANTZI, ESQ.  
BY: IAN BROOKS, ESQ.

Counsel for the Plaintiffs



1 APPEARANCES CONTINUED:

2 MORRIS, NICHOLS, ARSHT & TUNNELL, LLP

3 BY: JACK B. BLUMENFELD, ESQ.

4 BY: MICHAEL J. FLYNN, ESQ.

5 -and-

6 DUANE MORRIS, LLP

7 BY: KARINEH KHACHATOURIAN, ESQ.

8 Counsel for the Defendant

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1 THE COURT: Counsel, before we  
2 begin, let me just say a few things for the  
3 record here. The first is that we're here today  
4 in the matter of Contour IP holding, LLC, et  
5 al., versus GoPro, Incorporated. That's civil  
6 action number 15-1108-LPS-CJB here in our court.  
7 And we're here for oral argument on two pending  
8 motions, two motions to stay, one in favor of  
9 IPR proceedings and the second relating to  
10 Federal Rules of Procedure 41(d). And in  
11 addition we're here to hold a case management  
12 conference in the case.

13 Before we go further, let me ask  
14 counsel for each side to identify themselves for  
15 the record, beginning with Delaware counsel.  
16 We'll start with counsel for the Plaintiff, Ms.  
17 Keller.

18 MS. KELLER: Good afternoon, Your  
19 Honor. Karen Keller from Shaw Keller on behalf  
20 of the Plaintiffs, Contour IP Holding, LLC, and  
21 iON Worldwide, Inc. With me today from Ropes &  
22 Gray are Paul Schoenhard, Nicole Jantzi and Ian  
23 Brooks.

24 THE COURT: Welcome to you all.

1 All right. And for Defendant's side.

2 MR. BLUMENFELD: Good afternoon,  
3 Your Honor. Jack Blumenfeld from Morris Nichols  
4 for GoPro. And with me at counsel table are  
5 Karineh Khachatourian of Duane Morris in Palo  
6 Alto and Michael Flynn from Morris Nichols. And  
7 with Your Honor's permission, Ms. Khachatourian  
8 will be arguing today.

9 THE COURT: Thank you. Welcome  
10 counsel from near and far. All right. What I  
11 thought we would do is to hear, as I think I  
12 suggested in my oral order is to hear oral  
13 arguments on the motions first and I've  
14 allocated 45 minutes per side to each side with  
15 regard to those two motions. Then I'll likely  
16 take a short break and come back out and we can  
17 address kind of the case management conference  
18 portion of this hearing. I should also tell you  
19 that I'm our criminal duty judge this week and I  
20 expect that there's going to be a brief criminal  
21 matter that I will likely have to address  
22 somewhere in the midst of what we're doing. My  
23 hope is it will kind of come about around the  
24 time when we're going to take a break between

1       these two portions, but it's a matter that would  
2       have to proceed under seal and so either if it  
3       comes naturally during our break that these  
4       parties are ready or if they are ready  
5       beforehand, at some point I'll have to ask the  
6       parties to leave the court room while we take a  
7       short break so I can handle that matter. I  
8       doubt it will take any longer than 5 or 10  
9       minutes, but I just want to keep you apprised of  
10      that, okay?

11                       I know there's two motions, which  
12      are different motions, but in light of their  
13      size, I think it makes sense for me to here  
14      argument from the movents as to both motions  
15      kind of in order, whatever order you want to  
16      take them. Then I'll hear a response from the  
17      respondent as to both and then any rebuttal that  
18      the movent wants to make instead of having two  
19      separate times to have the parties get up and  
20      sit down for motion practice.

21                       Other than that, I think both  
22      motions are Defendant's motions and so I call on  
23      counsel for Defendant to come forward and begin,  
24      Ms. Khachatourian. And I think I've allocated,

1 as I said, 45 minutes percent side. What I'll  
2 do is ask my law clerk to let me know when you  
3 have 10 minutes left and let you know, that way  
4 you can be sure to save any time you need to.

5 MS. KHACHATOURIAN: Thank you,  
6 Your Honor. I appreciate it. At the outset, I  
7 wanted to make clear for both motions that I do  
8 not think iON needs to be considered in the  
9 disposition of either motion. Activities have  
10 occurred since the briefing of these motions  
11 that I think the Court needs to be aware of. As  
12 I understand it, iON is not an exclusive  
13 licensee to the patents in suit and therefore  
14 iON does not have standing to be a co-plaintiff  
15 in this suit. We have asked Plaintiff's counsel  
16 for the basis for why iON has standing in this  
17 case. They haven't responded to us. We had  
18 asked for certain corporate documentation so  
19 that we could more fully understand the  
20 relationship between Contour and iON. Some  
21 documentation was provided where those who have  
22 reviewed it on Defendant's side doesn't see why  
23 iON would be legally required to be a  
24 co-plaintiff. We've asked for supplemental

1 documentation and we haven't received a  
2 response.

3 The second reason why iON  
4 shouldn't be considered here is because they  
5 didn't oppose. They didn't file any opposition  
6 to either the 41(d) motion or the motion to stay  
7 pending IPR; therefore, if the Court were to  
8 rule that GoPro is entitled to costs and fees  
9 under 41(d), since iON didn't oppose, we think  
10 there should be a ruling in favor of GoPro  
11 vis-a-vis iON because they didn't oppose and the  
12 same with the motion to stay pending  
13 reexamination.

14 THE COURT: Just real quickly on  
15 those two issues. As to the standing issue, do  
16 you understand that to be opposed? You believe  
17 iON has standing, you don't believe it's an  
18 exclusive licensee? Do you understand the other  
19 side to be opposing that view, that this is a  
20 contested issue at least as of now?

21 MS. KHACHATOURIAN: That is not my  
22 understanding.

23 THE COURT: Oh, you think it's  
24 undisputed?

1 MS. KHACHATOURIAN: That is my  
2 understanding, yes. I think that's probably a  
3 question that you might want to pose to them.  
4 But that's my understanding that there is no  
5 dispute to the fact that they are not an  
6 exclusive licensee. And in fact, I believe it  
7 was February 19th, the day the oppositions were  
8 due to the motions that GoPro filed, Contour  
9 filed an amended complaint basically withdrawing  
10 iON from the pleading and stating that they had  
11 not paid license fees and therefore were no  
12 longer an exclusive licensee and withdrew iON  
13 from the case. And I believe then the following  
14 Monday they withdrew their amended complaint.  
15 After that, I have had discussions with  
16 Plaintiff's counsel who, I believe, has  
17 confirmed that they are presently not an  
18 exclusive licensee and that that license has  
19 been terminated.

20 THE COURT: Okay. Certainly if I  
21 forget, I'll ask Plaintiff's counsel to remind  
22 me to address with Plaintiff whether that issue  
23 is disputed and whether, in fact, iON is  
24 asserted to be an exclusive licensee or not. I

1       guess if it were disputed and if iON were still  
2       in the case, I guess on what basis would I have  
3       when I resolve these motions, not to consider  
4       their presence prior to say the adjudication of  
5       a motion to dismiss for lack of standing? In  
6       essence, wouldn't you being having me decide  
7       that kind of a motion to dismiss without  
8       briefing or argument if this were, in fact, a  
9       disputed issue and if they were at least  
10      technically still a party in the case?

11                   MS. KHACHATOURIAN: Your Honor, I  
12      think if the Court believes that a motion to  
13      dismiss based on lack of standing were necessary  
14      to adjudicate that issue, then yes, I would  
15      agree with you that that's what I would be  
16      asking you to do. But here, with respect to the  
17      motion for costs, it doesn't really matter,  
18      because they didn't oppose. The reason the  
19      status matters is because Contour is arguing  
20      that iON is a different party than the parties  
21      before and there's analysis about that that I'll  
22      get into. So if the Court believes it needs  
23      additional information before it can make that  
24      determination based on the open questions, if



1       there are any, then yes, Your Honor, I would  
2       agree with you, but I don't think that's the  
3       case here.

4               THE COURT:   And then they didn't  
5       file an opposition.   Am I right, that it looks  
6       like from the documents because the day they  
7       didn't file an opposition when it was due, they  
8       also filed the amended complaint to take iON out  
9       of the case?   Grant you, subsequently we have  
10      this notice of withdrawal that came into play.  
11      I understand that is unusual.   We'll get into  
12      that.   That's what happened, right?   That's why  
13      they didn't file something, because they took  
14      iON out of the case on the day the motion was  
15      due to be responded to; is that correct?

16              MS. KHACHATOURIAN:   I don't know  
17      if that's the reason.   Unfortunately, you're  
18      going to have to ask them.   I would just be  
19      guessing.   But what I will say as an attorney,  
20      if the other side points out that an opposition  
21      has not been filed, other than feeling sick to  
22      my stomach and finding out, you know, what the  
23      issues are, if I was going to file an opposition  
24      after receiving that notice, I would, in fact,

1 file one and I would beg for the Court's mercy.

2 THE COURT: Okay.

3 MS. KHACHATOURIAN: So it does beg  
4 the question as to what the situation is here  
5 because we actually also filed -- it was a  
6 notice. It wasn't phrased a notice of  
7 non-opposition, but it essentially was a notice  
8 to the Court that no opposition was filed and  
9 therefore we had asked for an order in our favor  
10 vis-a-vis iON. And there was no response to  
11 that notice either. So there's, you know --  
12 there are two opportunities where if they wanted  
13 to file an opposition, they could have. And  
14 counsel is present day, and they announced that  
15 they are counsel for both iON and Contour, so if  
16 they wanted to file something, they obviously  
17 could have. And the Contour papers did not  
18 include any mention that it was on behalf of  
19 iON, but our motion specifically stated that our  
20 motions were against both parties.

21 THE COURT: Okay. Why don't we  
22 press on?

23 MS. KHACHATOURIAN: Okay. Thank  
24 you very much, Your Honor. I think I'm going to

1 take the, if it pleases the Court, the motion to  
2 stay pending IPR first.

3 THE COURT: Sure.

4 MS. KHACHATOURIAN: The reason for  
5 that is if the Court were to agree with GoPro  
6 and grant the stay, then the issues with respect  
7 to the 41(d) motion could be deferred, because  
8 the case would be stayed. And that may be  
9 practical to the Court, because I suspect  
10 knowing that the Court has read the papers, that  
11 the Court is wondering about the difference  
12 between Huntley and Garza in this jurisdiction.  
13 And the Garza case is actually up on  
14 interlocutory appeal right now. I did check the  
15 status. I hadn't seen anything new. But based  
16 on the memorandum certifying the interlocutory  
17 appeal, Judge Robinson did state that she was  
18 granting -- she was certifying it for  
19 interlocutory appeal because she saw that there  
20 were substantial grounds for a difference of  
21 opinion as to its correctness. She also  
22 acknowledged that the issue had not been  
23 resolved by the Third Circuit and she felt that  
24 it was better to stay the case because there had

1 already been a stay in place to wait for the  
2 appeal to be concluded. I'm fully prepared to  
3 discuss all those issues when we address 41(d),  
4 but I did want to raise that with the Court  
5 outright, that if you were to grant the motion  
6 to stay pending IPR, the 41(d) issue could be  
7 deferred at which point the Third Circuit may  
8 have spoken by the time the IPR is concluded in  
9 October.

10 THE COURT: And so the current  
11 status in Garza is that Judge Robinson certified  
12 the case for interlocutory appeal, the Third  
13 Circuit has accepted the case.

14 MS. KHACHATOURIAN: Sure.

15 THE COURT: It's in the course of  
16 briefing. Or is it pending a decision?

17 MS. KHACHATOURIAN: My  
18 understanding it's in the course of briefing. I  
19 don't know anything more than that.

20 THE COURT: So practically -- and  
21 I know this relates to the Rule 41 issue, not  
22 the issue you're starting with, but since you  
23 mention it. We have a situation where we're  
24 pretty sure we're going to get a binding

1 decision from the Third Circuit at some point  
2 within the next number of months on the  
3 attorneys fees issue; is that right?

4 MS. KHACHATOURIAN: That is  
5 correct.

6 THE COURT: That wouldn't  
7 necessarily -- well, let's talk about -- when we  
8 get to Rule 41, let's talk about whether -- you  
9 know, because one of the questions is going to  
10 be, why would you say anything about that issue  
11 if you knew the circuit to which you were going  
12 to follow was about to decide it? But maybe we  
13 can talk about whether there are other aspects  
14 of that motion, even if I was uncertain about  
15 whether I should maybe wait for the Third  
16 Circuit on that question that could be decided  
17 in the short term, but why don't we start with  
18 the IPR stay request.

19 MS. KHACHATOURIAN: Thank you,  
20 Your Honor. I think it's helpful to start with  
21 the timeline of this case. And to the extent  
22 this is duplicative of anything, Your Honor,  
23 please just interrupt me because I don't mean to  
24 duplicate. But I though it was important to see

1       it in context, because the patterns here are  
2       relevant to why a motion to stay pending IPR  
3       should be granted given what the Plaintiff's  
4       opposition is to GoPro's motion.

5               This case was originally filed in  
6       November 2014, and Contour LLC, on the same  
7       patent suit, Camp Saver, which is a small mom  
8       and pop store in Utah. In January 2015, GoPro  
9       was added. I had a conversation with Contour's  
10      counsel at that time, who had said to me that  
11      Camp Saver was sued for jurisdictional reasons  
12      to keep the case in Utah because you had a Utah  
13      plaintiff, you have GoPro who is not in Utah and  
14      is a Delaware corporation whose business is  
15      really the centers in California. And that was  
16      stated to me unequivocally.

17             THE COURT: Just to stop for a  
18      second. I think what you're saying is that you  
19      had a conversation with opposing counsel in  
20      which they admitted the only purpose, the only  
21      reason to include a party in a litigation was to  
22      secure venue. And that's an issue that's  
23      relevant to the motions, but what you're saying  
24      right now isn't a part of the record, is it or

1 is there some --

2 MS. KHACHATOURIAN: It is  
3 actually, Your Honor.

4 THE COURT: Okay.

5 MS. KHACHATOURIAN: So, that  
6 conversation is memorialized in a pleading that  
7 was subsequently filed in Utah and is attached  
8 to our request for judicial notice, so it is my  
9 understanding that it is.

10 THE COURT: Okay. Do you happen  
11 to know where -- let me ask you maybe  
12 during -- well, to the extent there's some kind  
13 of declaration or it's equivalent as to that  
14 admission, you can point it out on me before we  
15 leave today.

16 MS. KHACHATOURIAN: I will do so.

17 THE COURT: Thank you.

18 MS. KHACHATOURIAN: GoPro filed  
19 its IPR's in the patents in suit in April of  
20 2015, so we did it very quickly. Actually,  
21 frankly, incredibly quickly. GoPro moved to  
22 dismiss in April of 2015 as well, on April 27th.  
23 Contour LLC and GoPro then stipulated to stay  
24 the Utah action. It was a joint motion, it was

1       agreed to on April 27th. The Court ruled on  
2       that motion on May 4th. So the Utah case was to  
3       be stayed until the motion to dismiss was heard.  
4       That motion, subsequently to that order several  
5       months later, was calendared for January 12th,  
6       2016, to be heard. So there was essentially an  
7       8-month stay until the case was dismissed and  
8       filed here in Delaware.

9               THE COURT: Was the idea that it  
10       was to be decided on that day as well or that  
11       that decision may also have still been pending  
12       and might have extended the stay?

13              MS. KHACHATOURIAN: The latter,  
14       Your Honor.

15              THE COURT: Okay.

16              MS. KHACHATOURIAN: And the order  
17       is in the documents that we submitted to the  
18       Court. In June Contour IPH, the holding company  
19       that is now the Plaintiff in this case, was  
20       formed. So while the case was stayed, shortly  
21       thereafter, this entity was formed. Case is  
22       stayed. November 23rd, 2015, the patents are  
23       assigned to this new entity, so there is a break  
24       in time, right? They decide to form this entity



1 in June, but they don't assign the patents until  
2 November 23rd. November 23rd happens to be the  
3 date that GoPro filed their motion to stay  
4 pending IPR in Utah. The reason why GoPro did  
5 that was two-fold; one, because Contour would  
6 not agree to extend the stay pending the IPR  
7 decision and two, we can't delay. If we had  
8 waited in filing the motion, I'm sure we would  
9 hear today that GoPro delayed and that we  
10 brought the motion for a tactical advantage,  
11 because that is one of the arguments you hear if  
12 you wait too long. So that is why we filed the  
13 motion to stay pending reexam when we did. A  
14 week later, unbeknownst to us, Contour dismisses  
15 the Utah action abruptly, out of nowhere and  
16 then refiles here in the same day. Does not  
17 answer the motion to stay. We never go to  
18 hearing in January and the stay is extinguished  
19 by virtue of the dismissal. When the suit was  
20 refiled here we asked Contour to stipulate to  
21 the stay and they refused. They did offer us a  
22 longer time to answer, but they refused to agree  
23 to a stay.

24 Believing that this is the same

1       action that's refiled, we send a demand letter  
2       on December 18th, which was never responded to.  
3       The hearing never went forward in Utah. We  
4       filed our motions. February 19th oppositions  
5       were due. We got the amendment to the complaint  
6       now taking iON out of the case, only for that to  
7       be reversed a couple days later. The IPR  
8       hearing is June 22nd and the Board must rule by  
9       October 28th.

10               These set of facts are important  
11       to I believe see in contact to sort of  
12       understand the pattern here and why GoPro feels  
13       strongly about the motions and why they filed  
14       them.

15               With respect to the motion to stay  
16       pending IPR there's really a few arguments that  
17       I could see that the Plaintiff makes as to why  
18       it should not be stayed. The first one, they  
19       don't disagree that we are in the early stage of  
20       the case, so you can check that off. Clearly  
21       nothing happened in Utah and nothing is really  
22       happening here other than these motions and the  
23       scheduling conference, so I don't think there's  
24       any dispute that we're in the early stage of the

1 case here. They oppose the idea that staying  
2 the case will simplify the issues. Their I  
3 think largest argument or the argument that I  
4 think they make most -- that's mostly out there  
5 is that well, they cite these line of cases that  
6 talk about, you know, the order's going to come  
7 out from the Board in a couple months, so  
8 there's no point in staying now. I believe one  
9 of the cases is Nexus. And so you know, we're  
10 not going to stay it right now, because there's  
11 not really going to be a lot of waste here, it's  
12 not going to be a simplification. But those  
13 cases don't have the facts as they appear here.

14 Essentially GoPro asserts that  
15 what Contour has done here is this was all in  
16 their control. They decided to create a new  
17 entity when they did. They decided to assign  
18 the patents. They decided to merge or not merge  
19 with iON. They decided to get into a license  
20 agreement or not with iON. All of these things  
21 were within their control. And for them to  
22 avoid a hearing in January where a motion to  
23 stay would have been heard and refile here and  
24 force us to have to file the motion to stay

1       again and say oh, well, now we're getting closer  
2       to the hearing and we're getting closer to the  
3       order, so we basically created this situation.  
4       And so, you know, to reward them for that  
5       procedural posture I think is sending a really  
6       dangerous message if the Court were to say well,  
7       it's not going to simplify the issues given the  
8       timeline here that you're hearing is in June and  
9       the PTAB is going to rule in October, because  
10      that is one of Contour's own making. They  
11      skirted the stay. They -- you know, everything  
12      was within their control and to stand here now  
13      and say well, the IPR is almost done, so we  
14      should just move forward really doesn't get to  
15      the core of the simplification of issues problem  
16      to begin with.

17               THE COURT: In terms of the the  
18      equities of it, you know, look, they ended up  
19      filing this new case and by the time this issue  
20      is now percolating in the second court or closer  
21      to the decision, they shouldn't be rewarded for  
22      that?

23               MS. KHACHATOURIAN: Correct.

24               THE COURT: I guess about that,

1       they did also buy themselves kind of a certainty  
2       of a number of months of additional delay,  
3       right? I mean, because they filed a new case  
4       and again, you know, it's different Plaintiffs,  
5       but I know you're putting together these groups  
6       of Plaintiffs, they kind of assured themselves  
7       nothing is going to happen on their case until  
8       at least, you know, what ended up being, you  
9       know, April of 2016. Why wouldn't, you know,  
10      why wouldn't that, that kind of burden that they  
11      kind of took on kind of help mitigate the  
12      equities a little bit in light of the, you know,  
13      the assertion you're making, which is I should  
14      consider the equities, don't give them a  
15      windfall by deciding this in their favor in this  
16      Court?

17                   MS. KHACHATOURIAN: But it doesn't  
18      balance the equities. And the reason for that  
19      is that they're getting exactly what they want.  
20      That delay, that several months, the case was  
21      already stayed in Utah. There would have been a  
22      hearing in January. That stay would not  
23      extinguish until the Utah court ruled. So  
24      they're not winning or losing anything in terms

1 of filing in a new jurisdiction where there  
2 would be some inherent delay.

3 Moreover, they did not request  
4 that we respond initially in the normal, I  
5 believe it's hopefully 21 days -- I think  
6 California is 30 -- in the 21 days. They were  
7 willing to give us 180 days. So delay wasn't  
8 really a concern for them. If they wanted to be  
9 a very active plaintiff and were concerned about  
10 the delay in Utah and coming to Delaware, they  
11 wouldn't have given us all, you know, all of  
12 that time to respond. It really wasn't an issue  
13 for them.

14 So that begs the question, why?  
15 And given the pattern and given the timeline, I  
16 believe and GoPro believes that filing here  
17 would get them closer to the decision to avoid a  
18 longer stay.

19 THE COURT: On simplification, if  
20 I'm trying to figure out, you know, the basic  
21 argument, the traditional, you know,  
22 simplification argument with respect to IPR  
23 motions to stay is, you know, if the case were  
24 not to be stayed first, is it likely that the

1 Court is going to have to engage in any work  
2 between now and October if the case weren't  
3 stayed that it wouldn't have to engage in if the  
4 case were stayed? For example, Plaintiff's note  
5 that the claim construction process here even  
6 under their proposals doesn't begin to get  
7 started until October of this year, so briefing  
8 doesn't happen until early 2017. From the Court  
9 perspective, isn't it probably the case that  
10 there isn't likely to be Court expended,  
11 identifiable Court expended resources that  
12 would, that would get expended if the case  
13 weren't stayed?

14 MS. KHACHATOURIAN: Your Honor, I  
15 think that there would probably be a multitude  
16 of discovery disputes between the parties that  
17 the Court would have to engage in, particularly  
18 given this corporate structure where CIPH is now  
19 contending in one opposition and in the  
20 scheduling papers that Contour LLC is a third  
21 party, for example, but when facing this motion  
22 to stay, they're saying that Contour LLC would  
23 be prejudiced if a stay were granted. So I  
24 think that there would be multiple of discovery

1       disputes, for example, not to mention the burden  
2       that GoPro would have to go to in terms of, in  
3       terms of having to produce discovery, putting  
4       three people through depositions. The core of  
5       the case concerning discovery is probably the  
6       most expensive there is for Defendants. And  
7       Plaintiff has already stated that the discovery  
8       is going to be somewhat broad. Also, there's  
9       going to be that standing motion, and there may  
10      also be a motion to transfer.

11               THE COURT: Now, as to all of  
12      those things, if we take at face value  
13      Plaintiff's assertion that they do intend to  
14      assert at least some if not all of the claims  
15      not at issue in the IPR, if I were to say to you  
16      well, with regard to either discovery-related  
17      work or motion-related work of the kind you're  
18      citing, if you take Plaintiff's assertion at  
19      face value, why wouldn't the Court ultimately be  
20      engaging in those kind of, that kind of work one  
21      way or the other in the case? Or put  
22      differently, what is something that clearly  
23      would not -- what is something that would happen  
24      in the next six months that clearly would not



1       happen, depending on what occurs in the IPR, if  
2       the IPR went a certain way?

3                   MS. KHACHATOURIAN: I think the  
4       best way to answer that question is to talk  
5       about the claims that were not subject to the  
6       IPR. The '694 Patent, all the claims are before  
7       the Board. On the parent patent, the '954, 23  
8       of the 30 claims are before the Board. The  
9       others -- the seven other claims are means plus  
10      function claims. And essentially what would  
11      happen is if those claims were to move forward,  
12      Your Honor, they are the same as the other  
13      claims that are before the Board, except they  
14      have to correspond to a structure. That's the  
15      whole point of the means plus function claims.  
16      But it's the same concepts, it's the same -- it  
17      describes the same invention. It's no different  
18      from the claims that are before the Board. And  
19      in fact, if all of these claims are held  
20      invalid, it is going to be very difficult, if  
21      not impossible, for Contour to raise these  
22      claims in this case. So you actually, the Court  
23      would be doing work that it wouldn't have to do  
24      if it waited for the PTAB.

1 THE COURT: Assuming they would  
2 drop the seven claims if they got a decision as  
3 to the others that they were invalid?

4 MS. KHACHATOURIAN: It's GoPro's  
5 assertion that they would have to. These are so  
6 closely related.

7 THE COURT: I still don't  
8 understand your point as to look, there's a lot  
9 that might come out as to the other 23 claims  
10 that could inform what's going on with respect  
11 to those seven claims. For example, I think you  
12 noted if there are terms in common, if we're  
13 likely to get some, some input on invalidity  
14 issues that are at least somewhat related to the  
15 seven claims. But you know, I guess again,  
16 taking at face value that they intend to go  
17 forward with these no matter what, I'm trying to  
18 figure out, what work is likely to be done by  
19 the parties or the Court in these six months  
20 that wouldn't have to be done? For example, I  
21 think you would say, look, at a minimum --

22 MS. KHACHATOURIAN: Invalidity  
23 contentions.

24 THE COURT: We'll be dealing with

1       some number of claims that could be out of the  
2       case. Is there anything else like that, if it  
3       went your way totally in the IPR surely this  
4       would be duplicative?

5                   MS. KHACHATOURIAN: Sure. There's  
6       infringement contentions that they have to do.  
7       We have to respond to that. We're going to get  
8       the interrogatories that ask for our entire  
9       invalidity case as well as our non infringement  
10      position. Infringement doesn't matter if your  
11      claims aren't valid, so why do all of that up  
12      front work now? Delaware has process where this  
13      is concerned, where you exchange early  
14      information, you exchange information about the  
15      accused devices and you provide technical  
16      material. They have already said that they  
17      probably want to see our source code, which is  
18      something that companies guard. There are all  
19      of these things that are going to breed dispute  
20      and they are going to cause a lot of work, not  
21      just for the parties, but for the Court.

22                   I mean, I think it's important to  
23      point out that the '954 is the parent of the  
24      '694 and the only true difference between them

1 is the '694 has, what do you call that, where  
2 you can hang it up? It has an apparatus, a -- I  
3 want to be completely clear on this. It has a  
4 hanging apparatus so that you can mount -- a  
5 mounting apparatus. That's the only difference  
6 between the two patents. These are closely  
7 related patents. They share the same  
8 specification. Other than this one minor  
9 detail, they are essentially the same. And I'm  
10 happy, if it pleases the Court, to go through  
11 these means plus function claims to point out  
12 how similar they are to the actual other  
13 independent and dependent claims that are before  
14 the U.S. PTO right now. It talks about, you  
15 know, preview, streaming, video and high and low  
16 resolution. I mean, all of the elements that  
17 are up at the Board right now are the same  
18 elements that will affect these claims.

19 THE COURT: Yeah. My only point  
20 is that, you know, it can cut both ways. In  
21 other words, I give you that there are lots  
22 of -- because there have more similarities, lots  
23 of expected simplification from a PTAB decision  
24 as to related claims for sure, but if the

1 Plaintiff can say somewhat convincingly, we're  
2 going forward as to these seven regardless, so  
3 they are going to have to produce the same docs  
4 about the same accused products. They are going  
5 to have to largely, you know, deal with  
6 depositions, deal with responses to requests for  
7 production interrogatories in the case one way  
8 or the other. Then the question is, well, you  
9 know, why stay it if we're likely to get a  
10 decision before claim construction really gets  
11 started? Now, if claim construction was, you  
12 know, half way done or, you know, all the way  
13 done, that might be different because you can  
14 easily see the Court's resources could be  
15 utilized there in a way that could be wasted.  
16 And I think you responded in part by saying  
17 look, we're dealing with contentions, we're  
18 going to be dealing with responses relating to  
19 those, to interrogatories in request for  
20 production. Anything else that you would point  
21 to in terms of wasted work?

22 MS. KHACHATOURIAN: I would point  
23 to a few things. As I said, those motions that  
24 wouldn't be filed.

1 THE COURT: Why would those  
2 motions not be filed?

3 MS. KHACHATOURIAN: If the case is  
4 stayed, we're not going to file a motion to  
5 dismiss for standing. If the case is stayed,  
6 we're not going to file a motion to transfer  
7 right now. I mean, the case is going to be  
8 stayed. If they are ruled invalid, the case is  
9 most likely over.

10 THE COURT: What I'm asking,  
11 though, is not what you would file were the case  
12 stayed. What I'm asking is would they  
13 be filed were the case to end up going forward  
14 as to the other seven claims?

15 MS. KHACHATOURIAN: Those motions  
16 aren't claim dependent, right? I mean, so they  
17 are procedural motions. But I would submit to  
18 the Court that this case was filed in Delaware  
19 after the PTAB instituted IPR and after the  
20 decision was offered. The decision was offered  
21 in October of last year. One month later,  
22 almost to the day, this case was filed. Nowhere  
23 in the complaint, I don't believe, they alleged  
24 these means plus function claims that they're

1 going to assert against GoPro. The first that I  
2 believe I became aware of it, and if I'm  
3 mistaken, then I'll be corrected, is when it was  
4 in the opposition to the motion to stay.

5 So knowing means plus function  
6 claims and knowing how difficult they are to  
7 pursue and knowing how related they are to the  
8 other claims that are already in the IPR, you  
9 almost have to think of it as if even though the  
10 Board didn't institute on those seven claims, it  
11 almost is a distinction without a difference.  
12 Because depending -- the Board's ruling will  
13 impact these claims. And so this situation  
14 really is no different from any other where  
15 folks move for a motion to stay pending IPR.  
16 You need to think of it as all of the claims  
17 were instituted. That's how closely related  
18 they are.

19 And if they were to file against  
20 us on those claims, that would have been done a  
21 long time ago. This case was originally filed  
22 in 2014 against Camp Saver and early 2015  
23 against GoPro. So it begs the question why all  
24 of a sudden now when you're faced with an

1       opposition to a motion to stay that you're going  
2       to assert that you're going to assert it against  
3       us. How are they going to assert it against us?  
4       I'd love to hear it, because where I stand I  
5       think that is going to be a very uphill battle  
6       and the Court is going to waste a lot of time  
7       and so are the parties in doing discovery on  
8       these claims and doing invalidity contentions  
9       and doing infringement contentions and basically  
10      responding to interrogatories and, you know,  
11      motion to compel disputes and all the rest of  
12      that. This is the meat of the case right now.  
13      We're at a crossroads. If you don't order the  
14      stay, everything is going to begin. And so then  
15      it doesn't matter if claims construction is  
16      after the ruling. All of the hard work and all  
17      of the expense is going to happen now and so  
18      that's why a stay is appropriate. The fact that  
19      seven out of how many claims, you know, seven  
20      out of maybe 40 claims wasn't instituted, if you  
21      look at the case law in Delaware and outside,  
22      you don't -- you don't have to -- there doesn't  
23      have to be a complete overlap. That's not  
24      required.



1                   And so if there was ever a  
2           compelling case to grant a motion to stay, not  
3           just because of the stage of the proceedings  
4           and, you know, the decision to institute and how  
5           many claims. I mean, this isn't a situation  
6           like some of the cases that Plaintiff cited  
7           where there are whole patents that people didn't  
8           move on that didn't institute. You know, one  
9           claim was asserted and you didn't seek PTAB  
10          review for that one claim. We're talking about,  
11          what, 93 percent of the claims are before the  
12          PTAB right now. The patents are so closely  
13          related. These seven claims are closely  
14          related. It's all the same invention except for  
15          this one small mounting distinction.

16                   So essentially what the Plaintiff  
17          is asking you to do is to start at the worst  
18          part of a case, frankly, which is discovery and  
19          invalidity contentions and producing source code  
20          and doing all this stuff and then hearing from  
21          the PTAB that the claims are invalid and then  
22          what? You can't undo that. So okay, GoPro is  
23          right. And everything that I say is going to  
24          happen happens, and then I've spent half a

1 million dollars my client has and we're in all  
2 these disputes and we have to produce all of  
3 this incredibly sensitive information and that  
4 can't be undone. You know, so waiting basically  
5 creates prejudice for GoPro that can't be fixed.

6 So, okay, October 28th a ruling  
7 comes out for the PTAB invalidating everything.  
8 Then what? All that work is done, whereas on  
9 the opposite side, Contour won't be prejudiced  
10 because they've already waited all of this time  
11 to prosecute their case.

12 The Plaintiff in this case is an  
13 NPE. It is a holding company. When it's  
14 convenient for them they say oh, Contour LLC is  
15 a competitor in this motion, but then for the  
16 other motion they say they're not related. The  
17 bottom line is they are an NPE. They didn't  
18 file a motion for preliminary injunction. They  
19 have not moved at a very fast pace here and they  
20 stipulated to a stay initially for a very long  
21 time.

22 So while Contour can then continue  
23 its case at the end of October because if their  
24 claims survive, all of the work GoPro will have

1 to then go through can't be undone. So while  
2 Contour can still do their case, if we do not  
3 succeed at the PTAB or some of the claims  
4 survive and then that case goes forward and it  
5 will be simplified and everyone will know the  
6 rules, here we're not going to get that half a  
7 million dollars back. We're not going to get  
8 our source code back, you know. We're going to  
9 be put to that burden with no relief.

10 So that's why this situation is  
11 ripe to stay the case, because what the PTAB  
12 says will have implications across the board  
13 where Contour, depending on how it goes, can  
14 still move their case forward. But GoPro can't,  
15 you know, can't take their source code back.  
16 They can't take their depositions back. They  
17 can't take any of that back. And you're putting  
18 them to a burden and you're having them do  
19 infringement analysis and do all of these things  
20 when infringement is not even going to be an  
21 issue if the patents are invalid.

22 THE COURT: Right. And we should  
23 move on. All I'm saying is I see a lot of these  
24 motions as I would do, the fact that it's a

1 little unique is because of the particular  
2 procedural circumstances here, going to get a  
3 decision from the PTAB necessarily in a much  
4 different and earlier, closer stage in time to  
5 when a case management conference is occurring  
6 as we often do, so that's all I'm saying.

7 MS. KHACHATOURIAN: I understand  
8 that, Your Honor. I will also submit and then I  
9 will move onto the 41(d) motion, that once we  
10 get that order, it's likely that Contour will  
11 appeal. Then what? Then does the case still  
12 continue? Do we come back and ask for another  
13 stay? By that time, I mean October is still --  
14 what are we in April -- October, so six months,  
15 that's six months away and the Federal Circuit  
16 appeal will take some time. So why do all of  
17 this work up front for claims that maybe will be  
18 asserted, which frankly I submit will probably  
19 not be and have never been to begin with?

20 On the 41(d) motion, in addition  
21 to the attorneys' fees issue, whether 41(d)  
22 includes attorneys' fees, there were several  
23 other arguments that Contour made in opposition.  
24 The first that it's not the same parties. And

1 as we said in our papers there's nothing that  
2 says it has to be the same parties, but also  
3 they are the same parties. I mean just because  
4 look, if it walks like a duck and quacks like a  
5 duck, it's a duck. So you created a holding  
6 company. You owned -- you were the Plaintiff  
7 and owned -- Contour LLC owned 51 percent. Now  
8 iON apparently owns 49 percent. Same patents,  
9 same agents, same place of business. Just  
10 because, you know, corporate shell game doesn't  
11 mean it's the same parties, but it is the same  
12 parties. But nonetheless, I mean Contour is  
13 Contour, like I said. In the opposition to the  
14 motion to stay pending IPR, they brought Contour  
15 LLC into it and said Contour LLC would be  
16 prejudiced. So okay, so then you're not the  
17 same party? I'm not following.

18 THE COURT: Can I just ask on the  
19 Rule 41 issue. I understand your point in terms  
20 of, you say look, the rule, there were two  
21 defendants, for example, out in Utah, one of  
22 those two defendants has now sued here. I think  
23 your point is there's nothing in the rule, the  
24 rule says if a plaintiff brings in essence the

1 same suit against a defendant, nothing in the  
2 rule you say requires that the plaintiff brings  
3 the same suit against the defendant and every  
4 other defendant that they happen to sue in the  
5 other district?

6 MS. KHACHATOURIAN: Correct. And  
7 also that just because you're changing name  
8 doesn't mean you're not the same plaintiff.

9 THE COURT: Well, that's the one  
10 I wanted to ask you a little bit more about.  
11 And but if I look at the rule, which reads if a  
12 plaintiff who previously dismissed an action,  
13 dot dot dot, files an action based on or  
14 including the same claim against the same  
15 defendant, I guess the question is, it is  
16 literally the case that this is not, that these  
17 quote same plaintiffs that initiated the case in  
18 Utah. I know your argument is that look, in  
19 essence it is, you know, look at the contortions  
20 they went through to make it a different  
21 plaintiff, but if I'm looking at the rule and it  
22 says a plaintiff, how do I -- how do I deal  
23 with the argument that this is not the same  
24 plaintiff, it's a different plaintiff? Albeit

1       one that's related to that plaintiff, but a  
2       different entity.

3                   MS. KHACHATOURIAN:   Two fold.  
4       First with respect to their admission in their  
5       opposition to the motion to stay, where they say  
6       Contour LLC would be prejudiced if a stay were  
7       entered.  If it was a different plaintiff, why  
8       are you mentioning Contour LLC to begin with?  
9       So that's number one.  Number two, I think you  
10      have to go back to the --

11                  THE COURT:   That's the motion to  
12      stay regarding the IPR?

13                  MS. KHACHATOURIAN:   Correct.

14                  THE COURT:   You're saying look,  
15      there they point to prejudice to Contour LLC, so  
16      they are kind of acknowledging they're basically  
17      the same entity?

18                  MS. KHACHATOURIAN:   Correct.  And  
19      then two, I think you need to look at the  
20      purpose of the rule, which is stated, you know,  
21      throughout all of the cases, including Garza,  
22      which is this rule is put in effect to protect  
23      defendants from having to defend the same action  
24      twice.  So that's a check here, right?  You have

1 the same defendant, because defending the same  
2 action twice. So then you just have the  
3 Plaintiff proc. But this entire rule is  
4 designed to protect against vexatious litigants  
5 and forum shopping. And it would be, I believe,  
6 a dangerous precedent to say because you changed  
7 the name of this entity and created a different  
8 corporate form that somehow you wouldn't be  
9 called the same plaintiff any more. And by the  
10 way, it's still got the name Contour in it. It  
11 might be a different name, but they are still a  
12 majority owner and all the rest of it, so --

13 THE COURT: So typically even if  
14 related, corporate forms are respected in lots  
15 contexts and supported in as to lots of motions.  
16 And so I'm wondering, for example, is part of  
17 your assertion that because Contour LLC merged  
18 with iON and iON was, in fact, a plaintiff when  
19 the case was filed that that has some bearing on  
20 whether or not the same plaintiff filed this  
21 case as did file the Utah motion?

22 MS. KHACHATOURIAN: It's unclear  
23 whether iON and Contour merged. It really  
24 depends on what you read. In one brief they say



1       they are partners. In another brief they say  
2       they merged. There's press releases that they  
3       say merged. The corporate documents don't  
4       indicate as such.

5               THE COURT: What do the pleadings  
6       say, the initial pleadings?

7               MS. KHACHATOURIAN: The pleadings  
8       say they merged. That's my recollection.

9               THE COURT: Is your assertion that  
10       a merged entity, iON merges with Contour LLC so  
11       in essence for purposes of Rule 41, that's the  
12       Plaintiff, the same plaintiff?

13              MS. KHACHATOURIAN: That's one of  
14       our contentions. But the other is that even  
15       though corporate formations are respected and  
16       41(d) doesn't require bad faith, certainly in  
17       your inherent authority and just generally, you  
18       could find that it is the same plaintiff,  
19       because there was a shell game going on, just  
20       like with any other type of creditor case or any  
21       other type of situation where if the purpose to  
22       create this entity was to basically skirt around  
23       trying to avoid this so that they could be in a  
24       better forum. And I believe the complaint says

1       that they decided to file here for iON's  
2       benefit, for iON's convenience because iON was a  
3       Delaware corporation. And that's where iON  
4       comes into play here, in that it doesn't appear  
5       that iON should be a plaintiff in this case.  
6       And therefore you can't really make the argument  
7       that because iON is a co-plaintiff, it's not the  
8       same plaintiffs. That was their argument in  
9       their opposition, is that because iON is a  
10      co-plaintiff, it's different plaintiffs. And  
11      then they go on about CIPH versus Contour LLC,  
12      but so then you just have CIPH and Contour LLC,  
13      same agents, same everything, Utah company. I  
14      don't think that those facts can be ignored in  
15      terms of making an analysis of whether they are  
16      the same plaintiff.

17               THE COURT: At least one other  
18      question I wanted to ask, which is in terms of  
19      the forum shopping assertion, is there something  
20      you could point to, I think at one point in your  
21      reply brief you say look, they filed here  
22      because it was clear that the case in Utah  
23      wasn't going well. You know, and I think --

24               MS. KHACHATOURIAN: That's right.

1                   THE COURT: I've got some case  
2     law, I think our Court does, typically when you  
3     hear forum shopping the thing that is kind of  
4     most prominent when that word gets thrown around  
5     is the idea that a party was refileing or filing  
6     in a different jurisdiction from where they were  
7     in order to avoid a Court's judgment or  
8     decision, one already issued or one likely to  
9     issue. What would be the evidence here that, in  
10    your view that I could look to what happened in  
11    Utah to say look, it's pretty clear that the  
12    reason why they dismissed and filed here is  
13    forum shopping in the sense that they were  
14    trying to avoid a decision that either had been  
15    issued or was likely to issue?

16                  MS. KHACHATOURIAN: First it's the  
17    stipulated stay that became an order. There was  
18    an indefinite stay in place until the motion to  
19    dismiss was decided. There was also a motion to  
20    stay pending that was going to be heard January  
21    12th. And I would submit to the Court that  
22    motions to stay pending reexamination in Utah  
23    are, are granted more readily than Delaware, for  
24    example. And so it's GoPro's assertion that

1       given the Camp Saver situation where we ended up  
2       in Utah -- and just to give you a little bit  
3       more background, Contour originally was based in  
4       Seattle, was a Washington company. And it got  
5       bought by Private Equity, which is based in  
6       Utah. And that's where Contour ended up being  
7       based. And then Contour sued Camp Saver first  
8       in Utah and then GoPro. GoPro is a Delaware  
9       corporation, principle place of business in  
10      California. So there was already this sense of  
11      forum shopping in the Utah case. And then  
12      according to Contour's papers, what they state  
13      is they came to Delaware for the convenience of  
14      iON. They say that in their complaint. iON is  
15      a Delaware company. They also say that it's  
16      better to be in Delaware because GoPro is a  
17      Delaware company as well. And they say that  
18      they got new lawyers. And iON is a Delaware  
19      corporation and they assigned the patents to  
20      this CIPH, so Contour LLC didn't own the patents  
21      any more and so a week after we filed the motion  
22      to stay, they filed in Delaware.

23                   THE COURT: You think what  
24      happened is they thought they were going to lose

1 the motion to stay pending IPR in Utah and  
2 that's why they dismissed and you think the  
3 record would bear it out?

4 MS. KHACHATOURIAN: Correct.

5 THE COURT: Okay. You're right  
6 up against your time. I'll give you at least  
7 five minutes for rebuttal. Any last point you  
8 want to make briefly that you didn't get a  
9 chance to make initially?

10 MS. KHACHATOURIAN: No, Your  
11 Honor.

12 THE COURT: Okay. Thank you.

13 MS. KHACHATOURIAN: Thank you so  
14 much.

15 THE COURT: All right. Let me  
16 hear from counsel for the Plaintiff's side. Mr.  
17 Schoenhard.

18 MR. SCHOENHARD: Yes, Your Honor.  
19 Good afternoon.

20 THE COURT: Good afternoon to you.

21 MR. SCHOENHARD: Your Honor, today  
22 I am -- my apologies.

23 THE COURT: No, that's okay.  
24 Please continue.

1 MR. SCHOENHARD: Your Honor, today  
2 I'm appearing on behalf of both Contour IP  
3 Holding and iON Worldwide. You've heard quite a  
4 bit of argument over the last 45 minutes or so  
5 about some confusion as to what their respective  
6 roles are. I think it probably behooves me and  
7 the Court to go through that briefly and then  
8 enter our way back into the motions that are  
9 before the Court in a moment.

10 I think it's helpful probably to  
11 begin at the beginning of the story. At the  
12 closing of Ms. Khachatourian's argument, she  
13 referenced Contour's genesis in Seattle.  
14 Probably makes sense for us to start there at  
15 least briefly and I expect to move quickly  
16 through this.

17 Contour was started as an action  
18 camera company in Seattle. Very early in its  
19 years found strong competition from GoPro. They  
20 were readily considered to be two of the most  
21 formidable companies in the space. GoPro be it  
22 by dint of marketing or otherwise, I'm not a  
23 marketing expert here, but ultimately was  
24 prevailing in the marketplace and Contour was

1 not doing well financially. Contour ultimately  
2 ended up in receivership. Contour was brought  
3 out of receivership through Private Equity and  
4 relocated itself into Utah. The two primary  
5 assets of Contour were its intellectual property  
6 portfolio that it had been developing throughout  
7 its time and also its operating practices, its  
8 operating company and its line of action  
9 cameras, so its goods and also its IP. It  
10 continued at that point to try to engage in  
11 competition with GoPro or to resume competition  
12 with GoPro. It had difficulty doing this in  
13 part because in its view GoPro was continuing an  
14 ongoing infringement of Contour's IP portfolio,  
15 so Contour filed suit.

16 At this point we're referring to  
17 Contour LLC. The corporate forms will matter as  
18 we go along. That case was originally filed as  
19 a case against Camp Saver, a Utah based company  
20 that was filed at the end of 2014 in Utah.  
21 GoPro was added into the case in early 2015. I  
22 was not counsel in that case and I cannot attest  
23 to Your Honor one way or the other regarding Ms.  
24 Khachatourian's conversations that she may have

1 had with previous litigation counsel.

2 THE COURT: For what purpose  
3 could Camp Saver have been added to the other  
4 litigation other than to achieve a stronger  
5 venue?

6 MR. SCHOENHARD: My general  
7 understanding of the reason for suing Camp Saver  
8 in the first instance was that they were a Utah  
9 company that was selling into Utah products that  
10 infringed. And what the ultimate plan had been  
11 in terms of a litigation strategy, I am not  
12 fully aware, but the reason or what would seem  
13 reasonable to me is that you have one Utah  
14 entity which would naturally have venue in Utah  
15 where it's experiencing its personal harm. So  
16 we had another Utah entity that it perceived as  
17 an infringer directly in its Utah marketplace.

18 Thereafter, the suit brought in  
19 GoPro a couple months later and as Ms.  
20 Khachatourian pointed out, the suit was stayed  
21 pending resolution of a motion to dismiss in  
22 approximately May of 2015 when at that point  
23 neither Camp Saver nor GoPro had answered the  
24 complaint and there had been no substantive



1 proceedings.

2 Fast forward thereafter. At this  
3 point Contour is having some difficulty in the  
4 marketplace again and is looking for a  
5 marketplace partner. It finds iON Worldwide, a  
6 Delaware based corporation that is also in the  
7 wearable camera space. They are complimentary  
8 products, not exactly the same products, but  
9 complimentary products. iON was specializing in  
10 wearable cameras and Contour in action cameras  
11 and in iON, Contour saw a possible strong  
12 business partner that would then ultimately be  
13 responsible for manufacture and sales of Contour  
14 cameras going forward. They entered into an  
15 agreement with an intent to merge those two  
16 corporate entities, Contour LLC and iON  
17 Worldwide, Inc. As part of that merger  
18 agreement, the intellectual property of Contour  
19 was assigned to a holding company, Contour IP,  
20 one of the named Plaintiffs here. And each of  
21 Contour LLC and iON Worldwide took an ownership  
22 interest in Contour IP. Contour IP then issued  
23 to iON Worldwide an exclusive license to  
24 practice of the patents.

1 THE COURT: So the two entities  
2 merged?

3 MR. SCHOENHARD: The two entities  
4 attempted to merge. And this explains in part  
5 the challenge in language here. They entered  
6 into a functional merger. [REDACTED]  
7 [REDACTED]  
8 [REDACTED] and ultimately  
9 that merger has resulted in a dissolution of  
10 that merger that is in process in the background  
11 today. I represent both Contour IP holding and  
12 iON Worldwide. As the Court would surely  
13 appreciate, I'm ethically borrowed from advising  
14 either in terms of how that dissolution is to  
15 take place or personally getting involved in  
16 their dissolution proceedings. My understanding  
17 is, and I can assure the Court that as of the  
18 time the complaint here was filed, iON was an  
19 exclusive licensee to the two patents in suit.  
20 Contour IP Holding was the owner of the two  
21 patents in suit.

22 Thereafter, the attempted merger  
23 started to fall apart and the companies, at the  
24 higher level, Contour LLC and iON have been

1 working to unwind that merger in the background.

2 [REDACTED]

3 [REDACTED]

4 [REDACTED] [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED] It's my understanding as of  
9 today that the parties expect to have reached a  
10 sufficient agreement regarding their dispute  
11 over licensing going forward that I should be  
12 able to provide the Court with a status update  
13 within the next week on that issue.

14 THE COURT: I guess, for purposes  
15 of where we stand, it is the case or is it not  
16 the case that as of this moment Contour LLC and  
17 iON have merged. Whether they are attempting to  
18 unwind that merger or whatever, -- isn't it the  
19 case that the two entities did merge, are  
20 currently iON, but are now attempting to unwind  
21 that merger or is the status something else?

22 MR. SCHOENHARD: That's not quite  
23 correct, Your Honor. At least to the best of my  
24 understanding. And I have acknowledge up front,

1 I am not a corporate or corporate restructure  
2 lawyer by training. My understanding is that  
3 the attempted merger failed relatively near to  
4 its inception in the process of bringing things  
5 together, such that day, as I understand it,  
6 Contour LLC is a separate operating company from  
7 iON Worldwide. What their respective rights are  
8 with respect to each other based on past  
9 contracts has been the subject of some dispute  
10 between them. But the two companies are  
11 operating as separate corporate entities, have  
12 separate management, are in other venues  
13 represented separately and are not moving  
14 forward together. It is my understanding that  
15 at no point did the merger get to the point that  
16 the two had fully merged into a single entity.  
17 In fact, Contour LLC was always intended to own,  
18 as a corporate body, a separate interest in  
19 Contour IP. iON Worldwide was intended to  
20 function as a manufacturing and sales arm of  
21 what would become the Contour brand.

22 THE COURT: In terms of the record  
23 before me on this, did you allege in the  
24 operative complaint that they merged?

1 MR. SCHOENHARD: Yes, in the  
2 operative complaint I alleged that the two had  
3 merged in the late summer of 2015. That was and  
4 is to this date my understanding of what the  
5 appropriate terminology would have been for the  
6 agreement they entered into and the process they  
7 were undertaking. Since the time of the  
8 operative complaint, the unwinding has taken  
9 place.

10 THE COURT: Has any of that stuff,  
11 whatever happened after this merger, is any of  
12 that stuff in the record? You're saying it  
13 right now in this hearing. Is there anything in  
14 the record that tells me what's occurred as  
15 alleged in the operative complaint that the two  
16 entities merged?

17 MR. SCHOENHARD: Your Honor, no.

18 THE COURT: Okay. And then as of  
19 today, and is it just your assertion -- I have  
20 to look at the record again, but is it the case  
21 that as far as you understand that iON is the  
22 exclusive licensee of the patents in suit?

23 MR. SCHOENHARD: Unfortunately,  
24 Your Honor, I'm not in a position to make a

1 formal assertion on that issue. It is my  
2 understanding that there has been a dispute  
3 between Contour IP and iON Worldwide as to  
4 whether that exclusive license has been  
5 effectively terminated and that it has been iON  
6 Worldwide's position that the exclusive license  
7 remains in effect. It has been Contour IP's  
8 position that the exclusive license has been  
9 properly terminated.

10 THE COURT: Maybe the better way  
11 to ask it is in terms of what the record shows  
12 in this case, the record that I can rely on,  
13 what is the state of the record as to whether or  
14 not iON is an exclusive licensee of the patents  
15 in suit and whether at any stage between when  
16 the case was initiated and now, iON failed to be  
17 or was no longer an exclusive licensee?

18 MR. SCHOENHARD: I appreciate Your  
19 Honor's interest in seeking clarity on this.  
20 And as far as the standing record is concerned  
21 in this case, iON Worldwide is, on this record,  
22 the exclusive licensee until such time as the  
23 dispute is resolved between them and the parties  
24 can inform the Court that either that license

1 has now been terminated or that iON continues  
2 forward as an exclusive licensee in the future.

3 THE COURT: And so on the current  
4 record you're saying there's no indication that  
5 at some point from the filing of the complaint  
6 until now iON lost its status as an exclusive  
7 licensee?

8 MR. SCHOENHARD: As my co-counsel  
9 has flagged for me, and I appreciate that and  
10 recognize it, the paper filed by Contour IP in  
11 opposition to the motions filed by GoPro in this  
12 case noted Contour IP's termination of that  
13 exclusive license, so Contour IP's position on  
14 that.

15 THE COURT: Okay. So Contour IP  
16 has stated in a filing that it terminated iON as  
17 an exclusive licensee?

18 MR. SCHOENHARD: Yes, Your Honor.

19 THE COURT: They may dispute that  
20 or may not. Sounds like they would dispute  
21 that, but that's in the record as well.

22 MR. SCHOENHARD: Yes, Your Honor.

23 THE COURT: Okay. Would you  
24 acknowledge what's going on here is unorthodox,

1 unusual?

2 MR. SCHOENHARD: Certainly, Your  
3 Honor. And I can acknowledge its put me through  
4 no shortage of consternation personally. Your  
5 Honor, as you recognized during Ms.  
6 Khachatourian's opening argument, the timing of  
7 the dissolution here is particularly unfortunate  
8 when it comes to the motions that are currently  
9 before the Court, in that on the same day that  
10 Contour IP filed its oppositions to GoPro's  
11 motions, Contour IP also filed an amended  
12 complaint which was subsequently withdrawn that  
13 would have effectively removed iON Worldwide  
14 from the case. [REDACTED]

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED] [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

22 For purposes of today's  
23 proceeding, I've been advised by both clients  
24 that they are comfortable with me proceeding on



1       behalf of both Contour IP and iON Worldwide,  
2       that the two share the same interest in ultimate  
3       resolution of these motions and the same  
4       interest in moving this case forward as  
5       expeditiously as practicable.

6               THE COURT:   Okay.   Well, why don't  
7       we, you know, take some bit of time, why don't I  
8       let you get to the points you want to make about  
9       both motions and I'll try to add in any  
10      questions I have along the way.

11             MR. SCHOENHARD:   Thank you, Your  
12      Honor.   If I take the motions in the same order  
13      in which Ms. Khachatourian did, I would begin  
14      with the motion to stay pending IPR proceedings.  
15      Here I would like to initially make three high  
16      level points which we can unpack and of course I  
17      will entertain Your Honor's questions as we go  
18      and we can see where the conversation heads.

19             The first and most important point  
20      for the Court here is the relevant stages of  
21      this litigation and of the PTAB proceedings.  
22      This topic consumed a significant portion of  
23      Your Honor's discussion with Ms. Khachatourian.  
24      I think it's something that we can address

1       briefly here. It is somewhat odd in going  
2       through this Court's cases on whether to stay  
3       pending IPR proceedings to find a situation in  
4       which the PTAB is near conclusion of its  
5       proceedings and litigation proceedings are in  
6       the early stages. As Ms. Khachatourian noted  
7       during her argument, really nothing has happened  
8       up until now, either in this Court or in the  
9       prior Utah action, which we'll address  
10      separately shortly. Here I think for Your  
11      Honor's benefit, the most important date in the  
12      proposed scheduling order is the claim  
13      construction hearing which had been proposed by  
14      the Plaintiffs to take place in February of  
15      2017. By that time the PTAB will have concluded  
16      its review of the two patents that are at issue  
17      in this case. That review would have concluded  
18      approximately three to four months earlier,  
19      depending on the precise timing of the claim  
20      construction hearing. And in fact, the parties  
21      would not have even begun briefing claim  
22      construction in this case. All activities  
23      between now and that time are activities that  
24      Contour and iON would expect would take place

1       regardless of the outcome of any PTAB  
2       proceedings. In particular, discovery regarding  
3       the accused products and their functionality  
4       would take place regardless. In the meantime,  
5       discovery regarding the validity of the patents  
6       would take place regardless.

7               The second point, which is highly  
8       related, is that there are, in fact, eight  
9       claims not at issue in the PTAB. I believe,  
10      Your Honor, Ms. Khachatourian mistakenly  
11      referred to the number as seven. It is, in  
12      fact, eight. It's claims 3 through 10 of the  
13      '954 Patent, so eight claims that are not at  
14      issue in the PTAB. And here --

15             THE COURT: As to those claims,  
16      you are asserting hopefully?

17             MR. SCHOENHARD: We certainly  
18      intend to, Your Honor.

19             THE COURT: Regardless of whether  
20      or not the PTAB invalidates every other claim as  
21      to that patent, you're asserting it is the  
22      Plaintiff's current intent to move forward in  
23      the case as to those eight claims?

24             MR. SCHOENHARD: It is the

1 Plaintiff's current intent, yes, Your Honor.

2 THE COURT: In terms of what would  
3 happen between now and October that might be,  
4 were, for example, the other 22, 23 claims to be  
5 invalidated, what might occur that would be  
6 wasted in that scenario? There would be some  
7 work, wouldn't there, responses to infringement  
8 contentions as to the other claims, invalidity  
9 contentions as to those claims -- the other  
10 claims specifically, wouldn't that be work that  
11 would be not utilized were the PTAB's decision  
12 to come out a certain way, or other, other  
13 examples?

14 MR. SCHOENHARD: To a great  
15 degree, I don't expect so. As an initial matter  
16 both Your Honor and Ms. Khachatourian have  
17 referred to non-infringement contentions. It is  
18 my understanding that non-infringement  
19 contentions are not regularly a part of Delaware  
20 patent practice. Infringement contentions  
21 surely would be. That's of course a burden to  
22 be borne by the Plaintiffs and a burden that the  
23 Plaintiff's are prepared to bear. On the issue  
24 of invalidity, yes, there would be invalidity

1       contentions that would be needed as to the  
2       additional claims.

3               THE COURT:   So you're not going to  
4       file interrogatories seeking their contention as  
5       to why they don't infringe?

6               MR. SCHOENHARD:   To the extent we  
7       would serve such interrogatories, Your Honor, we  
8       might expect, for example, that work in  
9       responding to those need not necessarily be  
10      performed or fully perfected prior to the PTAB's  
11      decision.   There's nothing in the Court's rules  
12      or the proposed schedule, as I understand it,  
13      Your Honor, that would force a decision in that  
14      interim period.

15              THE COURT:   You're saying you  
16      wouldn't press it?   If they said look, we don't  
17      want to respond to this until after October, you  
18      wouldn't push it?

19              MR. SCHOENHARD:   I think that  
20      would be reasonable, Your Honor.   On the issue  
21      of validity one would expect that GoPro already  
22      has in mind any invalidity contentions it has.  
23      One thing that unless I missed it, Your Honor,  
24      was not made clear during the earlier argument

1       this afternoon is that GoPro did, in fact, seek  
2       IPR review of the eight claims that are not  
3       currently before the PTAB and the PTAB declined  
4       to institute review on those claims. That's  
5       important for a couple reasons. First, GoPro  
6       has already gone through the effort to develop  
7       an invalidity case as to those eight claims. It  
8       is not as if they would be starting from whole  
9       cloth now. Second, it also renders, I believe,  
10      questionable, Your Honor, just how much impact  
11      the PTAB's decision as to the other claims would  
12      necessarily have on those remaining eight  
13      claims. After all, the PTAB has already decided  
14      that I'm effectively the same record with the  
15      same art before it to institute as to many  
16      claims, not to institute as to those eight  
17      facing the same arguments across the board. It  
18      is thus not clear to me, Your Honor, that a  
19      decision with respect to the others would  
20      necessarily apply to the eight claims, which, as  
21      Ms. Khachatourian acknowledges, are largely  
22      means plus function oriented, which adds an  
23      additional layer of proofs into a validity or  
24      infringement analysis, such that proofs not tied

1 to means plus function claims would not  
2 necessarily reach their means plus function  
3 counterparts.

4 THE COURT: Are you asserting that  
5 nothing the PTAB stays as to the remainder of  
6 the claims that are under review would have any  
7 bearing on the question as to whether or not  
8 those means plus function claims are invalid?

9 MR. SCHOENHARD: No, Your Honor, I  
10 would not go so far as to say it would have no  
11 bearing. Surely the PTAB's sound judgment with  
12 respect to other terms within those claims or  
13 how the the art might generally read could be  
14 instructive to this Court. But it would not  
15 necessarily be binding on this Court with  
16 respect to those claims. And also there would  
17 be the additional elements of the structural  
18 mappings that would not be conducted by the PTAB  
19 as part of its analysis.

20 THE COURT: I'll let you press on.

21 MR. SCHOENHARD: Related to Your  
22 Honor's last question, of course, I think it's  
23 worthy of noting that only two claim terms are  
24 subject currently to apparent claim construction

1 before the PTAB. The eight claims that are not  
2 before the PTAB include seven unique means plus  
3 function claim terms. So if we're looking  
4 forward to how this Court would likely proceed  
5 in claim construction, if we are looking forward  
6 to how the parties would argue with respect to  
7 the currently instituted claims of the PTAB and  
8 the non-instituted claims, we see little claim  
9 construction oriented overlap, just two terms  
10 currently before the PTAB.

11 Unless Your Honor has anything  
12 further on the motion to stay, perhaps we turn  
13 to the Rule 41(d) motion and devote some time  
14 there.

15 THE COURT: Okay. Couple quick  
16 questions.

17 MR. SCHOENHARD: Yes, Your Honor.

18 THE COURT: Can I consider the  
19 relationship of a non-party, Contour LLC, when  
20 it's trying to determine what prejudice the  
21 Plainiff, Plaintiffs in this action would face?  
22 As opposed to treat them separately. You  
23 recognize the contradiction. You're asking them  
24 to treat them separately as to one set of



1 motions and then take into account the prejudice  
2 LLC would face as to the others. Why isn't that  
3 a contradiction?

4 MR. SCHOENHARD: I certainly do  
5 recognize that, Your Honor. And I believe that  
6 there is a narrow space between the two,  
7 although I will recognize that it is a narrow  
8 space. And that is really the function of  
9 parent subsidiary going up versus going down.  
10 Here Contour LLC owns a 51 percent share of  
11 Contour IP. As a result, what impacts Contour  
12 IP does impact Contour LLC. And GoPro's  
13 position in the marketplace, which is a direct  
14 competitor to Contour LLC, is thus relevant to  
15 how the holding or how the holding in a  
16 company -- I like to be careful in my usage of  
17 terms, Your Honor. My apologies. How the  
18 company with a controlling interest in the  
19 patent holding company is ultimately impacted.  
20 I would expect that for purposes of Your Honor's  
21 weighing of the various factors that the  
22 prejudice experienced by Contour LLC would  
23 receive relatively little weight as compared to  
24 the prejudice that could be experienced by

1 Contour IP as a patent owner directly.

2 THE COURT: Okay. And why don't  
3 you seek a preliminary injunction here?

4 MR. SCHOENHARD: As Your Honor is  
5 aware and as we will explore when we get into  
6 the Rule 41(d) motion, there have been  
7 proceedings ongoing between a Contour entity in  
8 the previous case, Contour LLC, and GoPro for an  
9 extended period of time. It did not seem  
10 reasonable, frankly, to me, Your Honor, that at  
11 the time that this case was filed by iON  
12 Worldwide and Contour IP that a preliminary  
13 injunction immediately be sought. I also know  
14 that preliminary injunctions are rarely granted  
15 and that this Court does have a very strong  
16 track record of moving forward expeditiously  
17 with patent proceedings according to its patent  
18 rules.

19 THE COURT: Lastly, in terms of  
20 the prejudice argument, you know, part of the  
21 idea is look, we're going to be prejudiced if  
22 we don't move forward in the stay pending IPR's  
23 grant. You know, the Defendant is saying look,  
24 these entities or at least entities relating to

1       them are out in Utah. They were holding the  
2       patents at the time. They agree to a stay for  
3       many months before this motion dismiss is  
4       rectified. And they take action by dismissing  
5       that case and filing here, which is almost  
6       certainly going to add further delay to the  
7       moving forward of the case. Its ended up  
8       adding -- whatever would have happened in Utah,  
9       its ended up adding some number of months now to  
10      the moving forward of the case as to these  
11      patents. If the idea is we need to move  
12      forward, we're so prejudiced if we're not moving  
13      forward, why doesn't the lack of moving forward  
14      of your own volition as to the patents, again,  
15      albeit as to a different entity in Utah, now  
16      tell me that there's no problem with granting a  
17      motion to stay here with respect to the case?

18                   MR. SCHOENHARD: Your Honor, I  
19      think it's very important and perhaps I should  
20      have made this crystal clear at the outset. I  
21      think it's very important that we recognize the  
22      difference between the agreed motion to stay in  
23      Utah and the motion to stay that is now pending  
24      before this Court. At various points, Your

1 Honor, I heard Ms. Khachatourian suggest that  
2 the motion to stay pending IPR review that was  
3 filed later in the Utah proceeding --

4 THE COURT: You agreed to the stay  
5 pending the resolution of the motion to dismiss.  
6 There was no agreement as to the motion to stay  
7 that you learned they were going to file as to  
8 the IPR?

9 MR. SCHOENHARD: Correct, Your  
10 Honor. As to that motion, the motion to stay  
11 pending the IPR, it was Contour's position that  
12 that motion was never properly filed and that a  
13 stay was already in place in the case. Nor did  
14 Contour LLC at that time have any interest in a  
15 further stay of proceedings. As to the stay  
16 pending the motion to dismiss, that was a stay  
17 of a limited duration pending the Court's  
18 hearing that was to take place in January of  
19 this year. Refiling or after the merger when  
20 iON chose, along with Contour IP, to file in  
21 this Court, that would not necessarily delay the  
22 case further. Neither the Utah action nor this  
23 action has ever seen an answer from GoPro,  
24 which, Your Honor, is something that continues

1 to astound me as my understanding of the rules  
2 is that at the allotted time either a Rule 12  
3 motion or an answer ought to be filed. We have  
4 not seen one yet. At the time that iON chose to  
5 bring this case in Delaware rather than  
6 attempting to intervene and recaption the then  
7 stayed Utah action, iON and Contour IP did not  
8 see any further delay that would be brought  
9 about by proceeding here in this forum that was  
10 readily convenient to iON, and again, has a long  
11 history of proceeding forward in patent cases.

12 THE COURT: But I guess -- well, I  
13 want to leave you time to argue the Rule 41  
14 motion. Put differently, the patent holder  
15 filed the Utah action when, sometime in 2014?

16 MR. SCHOENHARD: It was November  
17 2014.

18 THE COURT: And didn't fight, of  
19 its own volition, agreed to a world in which the  
20 case wasn't going to move forward until at  
21 least, and again, they transferred the patents.  
22 But you know, at least now basically or to the  
23 extent they didn't agree to that, the entities  
24 who currently have rights in the patent, whoever

1       they are, they agreed to it, so the idea is the  
2       holders of the patents have, of their own  
3       volition, agreed to not move forward from  
4       November 2014 until now. Now they say, wait a  
5       second. We've go to move forward, so why is  
6       there a contradiction there?

7                       MR. SCHOENHARD: Your Honor, I  
8       believe that in the process of your explanation  
9       you may have actually identified our answer.  
10      And that is the change of the corporate parties  
11      that are involved here. Contour LLC was the  
12      named Plaintiff in Utah, was the party  
13      proceeding in Utah and was comfortable with the  
14      several month delay that would have taken place  
15      pending that motion to dismiss in Utah. When  
16      Contour LLC found iON Worldwide as a business  
17      partner and target for a merger, iON Worldwide  
18      had a separate corporate interest and to this  
19      day continues to have a separate corporate  
20      interest. In fact, perhaps their separate  
21      corporate interests suggests the reason why that  
22      attempted marriage ultimately resulted in a very  
23      quick annulment or divorce. iON Worldwide has  
24      been, from the time it has taken an exclusive

1 license to the patents, through the figure of  
2 the complaint here in Delaware, has been very  
3 interested in proceeding rapidly on the patent  
4 rights it then held as an exclusive licensee.  
5 Contour IP Holding, the patent owner by  
6 assignment, is a non-operating holding company  
7 that had granted that exclusive license to iON  
8 and as part of that exclusive license a shared  
9 right for assertion. iON Worldwide, again, with  
10 an effort to move forward expeditiously in a  
11 forum of its choosing that was convenient to it  
12 as a Delaware entity and I believe its principle  
13 place of business is also local here. I believe  
14 it's in the Philadelphia area. I hope I'm not  
15 mistaken on that, Your Honor, that iON would  
16 move forward. iON Worldwide, Contour LLC is,  
17 different corporate entities, different  
18 interests in terms of how quickly this case  
19 ought to proceed.

20 THE COURT: Are there different  
21 decision makers at iON as opposed to the  
22 decision makers at Contour LLC?

23 MR. SCHOENHARD: At various points  
24 in time, Your Honor, it's not always clear to

1 me. I believe at a point during the merger, I  
2 believe they had started to share some level of  
3 management, which then rapidly unwound again.  
4 But my understanding is that the top level  
5 management of iON remained disparate from the  
6 top level management of Contour.

7 THE COURT: I guess what I'm  
8 asking is, Contour LLC decided that it was going  
9 to file a case in Utah. Then there was this  
10 merger or maybe not merger, whatever it was, and  
11 now there's iON. And separately there's this  
12 new holding company, Contour IP. If it turned  
13 out to be the case that the same people,  
14 regardless of the change in corporate form, who  
15 had decided to file the case in Utah were the  
16 same ones making the decision to now dismiss it  
17 and file it here, that might be one thing as  
18 compared to if it's different people, a new  
19 entity that comes in, has different views and  
20 wants to do something different, maybe that's  
21 something else. Is there anything in the record  
22 that helps me figure out whether these are the  
23 same decision makers or different decision  
24 makers as compared to Contour LLC versus iON



1       versus Contour IP?

2                   MR. SCHOENHARD: I don't believe  
3       so, Your Honor. And it's my general  
4       understanding that the top level decision makers  
5       were different, but without muddying the record  
6       here with speculation and without piercing  
7       attorney/client privilege, I couldn't dig too  
8       deeply.

9                   THE COURT: Fair enough. Let's  
10      move to the Rule 41 motion. My first question  
11      is, and you can supplement, is the other side  
12      has said, look, we believe forum shopping is in  
13      play and we think the reason why they dismissed  
14      that case and filed this case is because they  
15      thought they were going to lose the motion to  
16      stay pending IPR out there and they wanted to  
17      move forward. They were worried about it and  
18      had reason to be worried about a decision on  
19      that motion and they decided to file in a more  
20      friendly forum as to that legal issue. Tell me  
21      why the record doesn't support that conclusion?

22                   MR. SCHOENHARD: Yes, Your Honor.  
23      And I think that ties to two issues. The first,  
24      at the very obvious initial level, is the motion

1 to stay pending IPR in Utah and the second is  
2 what opposing counsel has referred to as a  
3 corporate shell game, which I think is then tied  
4 into this discussion. The first, the motion to  
5 stay pending the IPR in Utah was a motion that  
6 Contour never believed was appropriately filed.  
7 That case had already been stayed. There were  
8 no ongoing proceedings in that case as the  
9 parties awaited a hearing on a motion to dismiss  
10 in January, that was to happen in January of  
11 this year.

12 THE COURT: Was it going to be  
13 argued at that January hearing?

14 MR. SCHOENHARD: Not to my  
15 knowledge. As far as I'm aware, and with my  
16 apologies to the Court, if there's something in  
17 that docket of which I'm not aware, it's my  
18 understanding that that had not be calendared  
19 for argument, that the briefing had not been  
20 completed and that all that was currently of  
21 record in that case was GoPro's motion to stay.  
22 There would be no indication to Contour at that  
23 point, as far as I know, when that was going to  
24 be heard or how that could possibly impact that

1 case.

2 THE COURT: Is it the case that  
3 Contour IP was formed in Delaware on the same  
4 day that the motion to stay in favor of IPR was  
5 filed in the District of Utah?

6 MR. SCHOENHARD: No, Your Honor.  
7 Contour IP was actually formed in the mid summer  
8 of 2015. And I believe Ms. Khachatourian  
9 actually referenced, Your Honor, to when Contour  
10 IP was formed. The assignments of the patents  
11 took place into November of 2015, as iON and  
12 Contour were moving forward with their merger.  
13 And it was at that time that the assignments  
14 were recorded and almost immediately upon  
15 recordation of the assignments, which would then  
16 perfect the exclusive license grant to iON  
17 Worldwide, iON Worldwide and Contour IP, as of  
18 that time then being the patent owner and  
19 exclusive licensee, moved forward with the  
20 instant case. I can assure Your Honor that that  
21 timing was not tied to the filing of a motion to  
22 stay against Contour LLC.

23 THE COURT: Maybe I misspoke, but  
24 I had understood Ms. Khachatourian to be

1       asserting that on the same day the motion to  
2       stay in favor of IPR was filed in Utah, a  
3       relevant formation event with regard to Contour  
4       IP occurred, whether it was the formation in  
5       Delaware or their assignment of the patents. As  
6       far as you understand, did anything occur?  
7       Maybe I either misremember or am mistaking what  
8       Defendants stated, but did anything occur on the  
9       same day the motion to stay was filed in Utah?

10               MR. SCHOENHARD: Your Honor, I  
11       regret to say I don't know if it was precisely  
12       the same day, but I believe the assignments of  
13       the patents to Contour IP were recorded on  
14       approximately the same day or within several  
15       days of when the motion to stay pending IPR was  
16       filed in Utah.

17               THE COURT: Those two things were  
18       unrelated?

19               MR. SCHOENHARD: Yes, Your Honor.

20               THE COURT: Unrelated?

21               MR. SCHOENHARD: Yes, Your Honor.

22               THE COURT: All right. Let me  
23       just ask a couple more questions and then to the  
24       extent I don't cover the issues that you wanted

1 to touch on in my questions, I'll let you use  
2 your remaining time to address any more issues.

3 MR. SCHOENHARD: Thank you, Your  
4 Honor.

5 THE COURT: On the issue of the  
6 identity of the parties with respect to a Rule  
7 41 motion, if I'm trying to figure out whether  
8 or not when Rule 41 refers to a Plaintiff, one  
9 that must be, in all cases, the exact same  
10 entity that was in one case is in another or  
11 whether there is some flexibility there, I asked  
12 the other side what its best argument was on  
13 that question. What's your best argument as to  
14 why they're wrong and the fact that we have  
15 different entities as Plaintiffs in the cases  
16 makes a difference?

17 MR. SCHOENHARD: Your Honor, I  
18 believe the language of the rule here is clear.  
19 The language of the rule says a plaintiff,  
20 suggesting, in fact, the same plaintiff. Now,  
21 there are circumstances in which a corporation  
22 goes through a change in corporate form or a  
23 corporate name change. That is something that  
24 is certainly not unfamiliar to this Court. That

1 is substantively different when there is, in  
2 fact, a transfer of assets between parties.  
3 Here Contour IP Holding was formed as a separate  
4 entity with ownership interests by Contour LLC  
5 and iON Worldwide, a completely separate  
6 corporate entity, to then collectively own a set  
7 of IP that had previously been owned solely by  
8 Contour LLC. Contour LLC retained a slightly  
9 controlling interest in that holding company, a  
10 51 percent versus 49 percent share, but that is,  
11 in fact, a transfer of assets into a separate  
12 corporate form with separate -- and again, not a  
13 wholly owned subsidiary where you could even say  
14 that there is complete and total control over  
15 all assets including their disposition, rather a  
16 jointly owned entity as between Contour LLC and  
17 iON.

18 THE COURT: And maybe this is  
19 related, but this goes without saying, but it  
20 wouldn't, whether it were able to do it or not,  
21 it would be a great thing if the rule were  
22 basically meant to stop one party from filing a  
23 case in one district and then turn around and  
24 filing in another without having to incur some

1 costs, but someone got around that by somewhat  
2 cleverly, you know, creating an entity solely  
3 for the purposes of avoiding that rule, then  
4 feel good if that's the case. And if I'm asking  
5 you what's the, what's the basis to believe why  
6 this wasn't just simply, a, as the defense says,  
7 a shell game to avoid, among other things, the  
8 implication of that rule? You're saying well,  
9 look, this is a jointly owned entity that arose  
10 out of an attempted merger with another company.  
11 Is the idea behind that that look, it's got to  
12 be clear that there are other reasons why this  
13 entity was formed other than avoiding this rule  
14 or some harm in the litigation?

15 MR. SCHOENHARD: Yes, Your Honor.  
16 And I believe that's the reason why many of the  
17 cases addressed Rule 41(d) use the term  
18 vexatious. There is, as Ms. Khachatourian  
19 pointed out, a policy interest in avoiding  
20 duplicative litigation and the type of situation  
21 Your Honor has suggested where a party is really  
22 trying to sue a company, things aren't looking  
23 that great, go find a new forum. Here what we  
24 have is something that, Your Honor, in my view

1 is very, very different. Contour has gone  
2 through several forms over a period of years,  
3 each time largely because it has had difficulty  
4 competing against GoPro in the marketplace. And  
5 like a Phoenix rising up from the ashes, every  
6 time it attempts to do so either find a new  
7 owner or a new partner, GoPro manages to knock  
8 it back down. As part of its attempted  
9 resurrection, if you will, in Utah, Contour  
10 again tried to go up against GoPro in the  
11 marketplace and also in the IP arena. When it  
12 was running lower on resources it was looking  
13 again for another partner. It found iON  
14 Worldwide. It did not create or concoct some  
15 new entity. It did not look for a way to get  
16 out of Utah and find a convenient entity that  
17 would allow that, rather it looked for an active  
18 participant in the industry, a participant that  
19 could ideally leverage what it had and they  
20 could find some level of synergy between their  
21 product offerings and then compete effectively  
22 in the marketplace. There's no suggestion, I  
23 don't believe, Your Honor, anywhere in the  
24 record that iON Worldwide was not previously an



1 operating entity or was not a legitimate target  
2 for a merger with Contour. I don't believe such  
3 an argument could be made. Although ultimately  
4 that merger was unsuccessful, I think it's clear  
5 on this record, Your Honor, that iON and Contour  
6 had attempted to form something that ultimately  
7 could succeed in the marketplace that as part of  
8 that effort, iON ultimately became an exclusive  
9 licensee and attempted to control its own  
10 litigation of the IP assets that had at one  
11 point been held solely by Contour.

12 THE COURT: Relatedly, you say  
13 that the reason why the case was filed here was  
14 that Delaware was more convenient for iON.  
15 Perhaps you're saying it as to Contour IP too,  
16 but at least for iON. In terms of the people  
17 that are the decision makers, what was it about  
18 Delaware for those who were making decisions as  
19 to the new Plaintiffs that actually made it more  
20 convenient?

21 MR. SCHOENHARD: So for iON  
22 Worldwide, iON is a Delaware corporation that in  
23 its view is actually an important thing. People  
24 take advantage of Delaware as a forum for

1 particular reasons. Be it on the tax and  
2 bankruptcy side or be it on the IP side, there's  
3 quite a bit of respect for these courts when it  
4 comes to IP cases.

5 THE COURT: If it were the case  
6 that in essence the same people who were driving  
7 the entity that filed in Utah then turned around  
8 and dismissed it and filed here, that wouldn't  
9 make sense, right? You'd have the same decision  
10 makers who already filed this case in another  
11 jurisdiction and the ability to decide where to  
12 file it, would then be making a different  
13 decision, but your assertion is that was them,  
14 this is iON, iON was a different group of  
15 people?

16 MR. SCHOENHARD: Correct, Your  
17 Honor. iON -- that's where I was headed next.  
18 It's a Delaware corporation with a principle  
19 place of business here on the east coast. And  
20 I'll probably turn to my co-counsel and make  
21 sure it's a nod. I believe I may have misspoken  
22 earlier when I suggested it was a Philadelphia  
23 place of business. It may actually be New  
24 Jersey, I believe. But it is also physically

1 located here on the east companies.

2 THE COURT: All I'm saying, if the  
3 two entities merged but it turned out that  
4 Contour LLC, their decision makers, the heads of  
5 that company, became -- were iON and those  
6 people had already made the decision to file in  
7 Utah, it wouldn't make a lot of sense to say  
8 that iON decided that it was more convenient for  
9 it to file in Delaware if the entity, albeit a  
10 different entity, the decision makers were the  
11 same, right? Now, if there's some kind of  
12 merger and new persons who weren't involved and  
13 already filing the case in Utah come into play,  
14 maybe they have different views and et cetera.  
15 You're telling me it's the latter situation  
16 that's occurring here?

17 MR. SCHOENHARD: Yes, Your Honor.  
18 And I certainly appreciate your concern, but iON  
19 Worldwide is an east coast entity, not a Utah  
20 based entity. And iON Worldwide sought east  
21 coast based counsel to proceed with this case.  
22 They were interested in moving forward in  
23 litigation on their home turf against a company  
24 that they understood to be incorporated in the

1 same state they were and pursue forward with  
2 their claims.

3 THE COURT: Okay. You have a few  
4 minutes left. Let me just make sure there's not  
5 a question that I really want to ask that I  
6 didn't ask and give you a chance to add anything  
7 you need to add, Mr. Schoenhard. Is there  
8 anything you want to say about the argument that  
9 because iON didn't file a response to the  
10 motion, motions, that as to them the motion  
11 should be granted?

12 MR. SCHOENHARD: Yes, Your Honor.  
13 Thank you. I had intended to go there at the  
14 outset with my initial discussion of the  
15 corporate doings that are involved in this case.  
16 As Your Honor recognized during the earlier  
17 argument, at the time the oppositions were  
18 filed, the amended complaint was also on file  
19 and had not been withdrawn yet at that time.  
20 iON'S position today is that it stands in  
21 effectively the same shoes as Contour IP is,  
22 putting forward these same defenses as to these  
23 motions, but also notes that iON Worldwide was  
24 at no time involved in the Utah action nor is

1        iON Worldwide a party to the PTAB proceedings.  
2        And thus it was appropriate that Contour IP, as  
3        the patent owner and as per GoPro's allegations,  
4        the company more closely tied to Contour LLC to  
5        continue to lead the charge as to these two  
6        motions.

7                    THE COURT: Is there anything you  
8        want to say, Mr. Schoenhard, that I haven't  
9        asked you about with regard to Rule 41? You're  
10      right about at your time. I'll give you a final  
11      word or two.

12                   MR. SCHOENHARD: Yes, Your Honor,  
13      if I could state two things just very briefly.  
14      First, Ms. Khachatourian repeatedly stated that  
15      nothing had happened in Utah. In fact, I  
16      believe at one point I wrote down the quotes,  
17      clearly nothing happened in Utah. When it comes  
18      to a motion, a rule like Rule 41(d) where the  
19      primary focus of the rule is on preventing  
20      duplicative litigation, the fact that nothing  
21      had happened in the prior suit is rather  
22      important. This is not -- that's primary point  
23      one.

24                   Primary point two, but relatedly,

1       there is nothing in this record that would  
2       suggest that iON and Contour's IP's interest in  
3       pursuing this litigation is vexatious or is  
4       directly tied to what Contour LLC was doing in  
5       Utah other than clearly as part of the pass of  
6       the patent rights there was a need to pursue the  
7       litigation either by attempting to intervene and  
8       go through procedural finagling in Utah or to  
9       file separately. ION and Contour IP, as the new  
10      parties in interest of the patents, chose to  
11      proceed in Delaware. I believe they had good  
12      cause to do so and that does not suggest any bad  
13      intent on their part.

14                   THE COURT: Okay. Thank you, Mr.  
15      Schoenhard.

16                   MR. SCHOENHARD: Thank you, Your  
17      Honor.

18                   THE COURT: I appreciate it. Ms.  
19      Khachatourian, I'm going to give you five  
20      minutes for rebuttal.

21                   MS. KHACHATOURIAN: Thank you,  
22      Your Honor. I'm from New York originally.  
23      Since I have five minutes I'm going to incline  
24      to talk fast, so slow me down if I go to too

1 fast.

2 Your Honor, first and foremost  
3 there are documents that go to the very point of  
4 who is in control of this litigation that  
5 Contour produced after all these papers were  
6 filed. It actually answered your question.  
7 They are marked attorneys eyes only, so I don't  
8 want to mess up the record to tell you what's in  
9 those documents. I don't know, do I have  
10 permission to discuss what are in those  
11 corporate documents? They're attorneys eyes  
12 only. But nonetheless, Your Honor should look  
13 at these documents, because they outline who has  
14 control of this litigation and it goes directly  
15 to the idea of who is in control, are they the  
16 same people, is it the same people as Contour  
17 LLC. All of the information you're asking for  
18 are in those documents.

19 THE COURT: Let me have you not  
20 make reference to documents that would otherwise  
21 be protected by either agreement or with regard  
22 to confidentiality, but I understand what you're  
23 saying is that there are documents not in the  
24 record that you think would shed light on some

1 of the questions I'm asking?

2 MS. KHACHATOURIAN: They are  
3 directly on point, but because they are marked  
4 attorneys eyes only, I don't want to cause the  
5 transcript to be under seal and all that  
6 information, so I would request that Contour  
7 provide you with these documents. They are  
8 short to the exclusive license and the terms of  
9 that license and the information is directly on  
10 point and will provide clarity as to who is  
11 actually the Plaintiff here. And I won't go any  
12 further than that.

13 The second thing I wanted to add  
14 was Contour LLC was the party that stipulated to  
15 the stay in Utah. And it's the same party now  
16 who is claiming prejudice if this action is  
17 stayed pending reexam. So it wasn't -- it was  
18 Contour LLC, so I don't think their argument is  
19 fair that, you know, it was supposed to be a  
20 brief stay and it should have moved forward.  
21 It's contradictory. You can't claim prejudice  
22 on the one side to a stay and then say hey, I'll  
23 stay this case for eight months, it's not a big  
24 deal.



1           In terms of my statement nothing  
2           had happened in Utah, what I meant by that was  
3           substantively.

4           THE COURT:   For purposes of the  
5           second filing of the motion to stay?

6           MS. KHACHATOURIAN:   With respect  
7           to the motion to stay that was pending in Utah,  
8           there had been a notice requesting that it be  
9           heard on January 12th.   It is true that the  
10          Court hadn't ordered that the motion to stay be  
11          heard on January 12th, but it had been  
12          requested, so Contour was on notice.

13          Contour also mentioned that they  
14          would not ask questions about the claims that  
15          were pending before the PTAB on infringement.  
16          Why is that, Your Honor?   Because it doesn't  
17          make sense to do so.   Inherent in that is a  
18          simplification of the issues.   So in some sense  
19          they at least are implicitly conceding that with  
20          respect to the claims that are pending before  
21          the PTAB, this case should be stayed and that  
22          the case should be simplified because of those  
23          pending claims.

24          And I will say that with respect

1 to these means plus function claims, and it's  
2 really important that the Court see that the  
3 claims that are at issue at the PTAB will have  
4 tremendous effect on these means plus function  
5 claims. It would be a waste of judicial  
6 resources for the Court to be reviewing whether  
7 the specific implementation of these means plus  
8 function claims is unpatentable without first  
9 considering the PTAB's decision as to whether  
10 claims directed to the same features are found  
11 to be unpatentable. In other words, these means  
12 plus function claims have the same features as  
13 all of the claims currently pending before the  
14 Board. The only difference is it's a  
15 corresponding structure and implementation. And  
16 to give you an example, if you actually look at  
17 these means plus function claims and compare  
18 them to the claims before the PTAB, Claim 1, one  
19 of the dependent claims state generated from the  
20 video image data, first video image content at a  
21 first resolution and second video image content  
22 at second resolution wherein the first  
23 resolution is lower than the second resolution.  
24 Essentially you're creating two video streams.

1       There's a lower and higher res. In Claim 3, one  
2       of the means plus function claims, a portable  
3       point of view digital video camera comprising,  
4       discusses some information and says means for  
5       generating a first data stream and a second data  
6       stream corresponding to the video image data  
7       wherein the second data stream is a higher  
8       quality than the first data stream. It's the  
9       same thing. It's just tied to a structure, to a  
10      device. And I could go through piece by piece,  
11      but essentially that's what you'll find. If you  
12      look at the claims, you will see an incredible  
13      amount of overlap.

14                   THE COURT: What's your response  
15      to the other side's point that the PTAB had the  
16      ability to institute review on these eight  
17      claims and didn't and so it indicates some  
18      greater substantive strength as to these claims  
19      vis-a-vis invalidity and therefore some greater  
20      likelihood that the case will in fact proceed  
21      forward as to those claims, and even if we are  
22      likely to learn important information from the  
23      PTAB as to the related claims?

24                   MS. KHACHATOURIAN: So the PTAB in

1 its analysis didn't say that, you know, it's not  
2 likely that these will be invalidated. What the  
3 PTAB said was just that we didn't show the  
4 required specific structure in the prior art,  
5 which is generally the case, because it's  
6 printed publications, it's not devices. So they  
7 are just --

8 THE COURT: But I guess my point  
9 is, if we're trying to take bets on whether this  
10 is a case where the Plaintiff is likely, in  
11 fact, to proceed forward even if they get bad  
12 news as to the related claims, why wouldn't, the  
13 substance of what the PTAB is saying to us  
14 suggest maybe this is a case where the Plaintiff  
15 might actually go forward even though you're  
16 telling me there's no way they can go forward?

17 MS. KHACHATOURIAN: Because the  
18 PTAB only addressed this at a high level.  
19 Because structure is difficult to see in prior  
20 art and they didn't really go into a lot of  
21 analysis. And given the relatedness of the  
22 claims. In other words, after the PTAB's  
23 decision, I think this will illustrate it,  
24 assuming GoPro wins on all claims. The patent

1 owner's argument necessarily becomes, even  
2 though the PTAB found all recited features as  
3 unpatentable, my specific implementation using  
4 specific hardware and software is still  
5 patentable. And GoPro uses the same specific  
6 hardware and software. So therefore they  
7 infringe. In other words, means plus function  
8 claims have the same features as all of the  
9 claims currently before the PTAB as I  
10 illustrated in one of my readings. The  
11 difference is you have to point to hardware and  
12 software. Well, if your features are invalid,  
13 it doesn't matter what my hardware or software  
14 does. So basically if the case isn't stayed,  
15 we're getting past the PTAB. We're not letting  
16 the PTAB do its job, because these claims are so  
17 interrelated. And the fact that the PTAB didn't  
18 institute on these claims really is of no  
19 relevance, because there is a whole slew of  
20 other prior art that we could bring into court  
21 that we couldn't bring at the PTAB given their  
22 limitations. And because means plus function  
23 claims are hardware software embodiments, you're  
24 more prone to go to the type of art that you

1       can't bring before the PTAB. It's only written  
2       publications.

3                   THE COURT: Okay. We're going to  
4       have to leave it there.

5                   MS. KHACHATOURIAN: One other  
6       super quick thing is given all the mess on who  
7       owns what and am I exclusive licensee, am I not,  
8       I think it's really important that the Court --  
9       it's not GoPro's burden, their dispute. I mean  
10      there is a shadow of doubt over who owns the  
11      patents and all the rest of it, so I think  
12      there's a preliminary question that needs to be  
13      decided whether iON owns these patents and who  
14      is the really the party in suit and why should  
15      this case move forward? So if the Court is not  
16      inclined to grant a motion to stay pending IPR,  
17      I would submit that the Court stay the case in  
18      its inherent discretion while the standing  
19      issues get worked out.

20                   THE COURT: Okay. Thank you.

21                   MS. KHACHATOURIAN: Thank you,  
22      Your Honor.

23                   THE COURT: Let me take a short  
24      break and come back probably in about five

1 minutes or so to pick up the remainder of what  
2 we're going to do here, which will be to talk  
3 about case management and other related issues.  
4 So court will stand for a short recess. Thank  
5 you.

6 (Short recesss.)

7 THE COURT: So it ended up being a  
8 little more than five minutes, but I was able to  
9 handle that criminal matter, so we won't have to  
10 deal with that before we're done here. Okay.  
11 So what's remaining is the case management  
12 conference portion of what's on our schedule for  
13 today. And let me just tell you, say a couple  
14 of things for the record about my role in the  
15 case and then talk about scheduling related  
16 issues. I know there are a number of disputes,  
17 including whether to set a schedule at this  
18 stage. So but first let me first say, as I  
19 think the parties know, with regard to my role  
20 in this case as it relates to the referral from  
21 the chief judge, I would have certain purview in  
22 the case which would include the following: I've  
23 been referred the case for scheduling purposes,  
24 which among other things means to prepare for

1 and handle the case management conference, which  
2 is what we're doing now, to decide one, whether  
3 to enter a schedule. It also means to decide  
4 any scheduling related issues that come up after  
5 a schedule is entered, for example, if there are  
6 protective order related disputes or other  
7 initial scheduling related disputes, those would  
8 be referred to me by Chief Judge Stark and I  
9 would decide them in the first instance. That  
10 said, what the parties could expect as the case  
11 moves forward, if and when it does, is that at  
12 some point you'll see from Chief Judge Stark's  
13 chambers an order that in effect would take back  
14 authority for dealing with scheduling related  
15 disputes. That order would probably come  
16 somewhere around three months or so from the  
17 date of the case management conference, again  
18 assuming the schedule is entered and the matter  
19 is proceeding forward. And the idea is that at  
20 that point we're likely closer to the case  
21 events which Chief Judge Stark himself is going  
22 to be handling those matters like Markman and  
23 what comes after it and so it only makes sense  
24 that at that stage of the case he and his



1 chambers be the one to decide whether any  
2 changes to the schedule should be made.

3 In addition to scheduling, I've  
4 got referral authority to decide motions to  
5 dismiss, transfer and stay. Obviously we have  
6 two stay motions before me now, which I will  
7 decide those motions in the first instance. And  
8 then lastly, the matter would be referred for  
9 alternative dispute resolution and I would be  
10 the magistrate judge who would initially be  
11 assigned to pursue discussions with regard to  
12 ADR with the parties.

13 That said, in cases like this  
14 where I also have authority from the chief judge  
15 to handle other substantive motions, what we say  
16 to the parties is to the extent that either one  
17 side or the other or both would wish or prefer  
18 that I not be the magistrate judge that  
19 addresses ADR with the parties because I have  
20 another role in the case to resolve substantive  
21 motions, in that instance, if even one party  
22 would not wish me to be the magistrate judge to  
23 handle ADR, the parties would file a short joint  
24 letter, the text of which is found on my portion

1 of the District Court's website, which in  
2 essence just says that there has been a request  
3 that a different magistrate judge be assigned  
4 the case for ADR purposes. If I get that  
5 letter, I forward it on to our chief magistrate  
6 judge, Chief Judge Thyng, then in almost all  
7 instances, she, in fact, does assign the matter  
8 to a different magistrate judge to pursue ADR  
9 while I remain with the remainder of the  
10 referral from Chief Judge Stark.

11 Okay. So second, with respect to  
12 process and procedure, what I would typically do  
13 and what I will do here today is to talk about  
14 the disputes that the parties have with regard  
15 to the schedule itself. Now, I know that one  
16 kind of threshold dispute is do I enter a  
17 schedule at all at this stage? And I would tell  
18 you on that front what I would normally do in a  
19 case like this, even with these two motions  
20 pending, is the decision -- really the only  
21 decision I have to make is do I enter a schedule  
22 now until I resolve these motions? What I would  
23 normally do is I would normally be inclined to  
24 enter a schedule in part because Chief Judge

1 Stark, as the parties know, in his patent  
2 procedures has a preference for cases remaining  
3 to move forward even with pending motions to  
4 stay in place. And because with respect to both  
5 these issues, there are the motion to stay  
6 pending IPR and the motion for costs, there are  
7 at least some substantive arguments on each side  
8 that are worth exploring. And so in the main  
9 what I would normally do is enter a schedule  
10 with the expectation that these motions would  
11 probably be decided at some point in the middle  
12 of the initial disclosures period. And if the  
13 motions were granted or one or the other were,  
14 then the case would be stayed at that point. If  
15 they weren't, the case would continue to move  
16 forward.

17 That being said, there are enough  
18 issues that I heard today about issues relating  
19 to merger, to patent ownership, to all of the  
20 moving pieces here, I want just a day or two to  
21 consider whether it does, in fact, make sense to  
22 enter a schedule or not with these motions to  
23 stay pending. So what I'm going to do is I'm  
24 going to go through with the parties the

1       disputes with regard to the schedule and resolve  
2       those and I'm going to address what other  
3       information should be included in a schedule.  
4       And I'm going to ask the parties to jointly file  
5       a revised proposed scheduling order by no later  
6       than this Friday so that I have a schedule that  
7       I can enter if I, in fact, decide in my  
8       discretion to do so and that will give me the  
9       time to be able to consider just a little bit  
10      more whether it makes sense to do that in this  
11      case.

12                   Any questions about that in terms  
13      of procedure going forward from the Plaintiff's  
14      side?

15                   MR. SCHOENHARD:  No, Your Honor.

16                   THE COURT:  Okay.  And the  
17      defense?

18                   MS. KHACHATOURIAN:  No, Your  
19      Honor.

20                   THE COURT:  All right.  Secondly,  
21      just in terms of before we get to the schedule  
22      related disputes, which is the next thing I will  
23      turn to, is as to the motions, particularly the  
24      motion to stay pending -- with regard to the

1 Rule 41 issue, I know the issue as to attorneys  
2 fees is before the Third Circuit. My  
3 expectation is at some point in the coming  
4 months we get a decision from them as to that  
5 issue, are attorney fees gettable as for purposes  
6 of Rule 41(d). My sense is and the parties can  
7 tell me if I'm wrong, even if I was inclined to  
8 wait for some guidance from the Third Circuit on  
9 that specific question, I could decide the  
10 threshold issue with regard to the Rule 41  
11 motion earlier; that is, whether there is even  
12 entitlement to costs under Rule 41 and thus  
13 whether the stay could even possibly be  
14 warranted while still putting to the side for a  
15 second whether if costs were gettable, those  
16 costs would include attorneys fees. Could I not  
17 do that or does any side see a problem with me  
18 being able to kind of at least decide that  
19 threshold portion of the motion even if I was  
20 inclined to wait for the Third Circuit as to the  
21 other issue from the Defendant's side?

22 MS. KHACHATOURIAN: Your Honor, I  
23 believe the answer would be yes, but there's one  
24 element that I'm a little concerned about,

1       because we don't have a full record not even  
2       today, which is who is the Plaintiff? So if  
3       Your Honor believes that you have to go beyond  
4       what's in the record to determine whether it's  
5       the same plaintiff, I believe there are  
6       documents and the corporate structure and who  
7       owns what is still incredibly unsettled. The  
8       record states that as of February 19th iON was  
9       not an exclusive licensee and there are  
10      documents that are produced to us that shed  
11      light on that one issue, on who has control.  
12      And so I would submit to Your Honor that in  
13      order to fully review the one issue of the  
14      Plaintiff, that Contour produce those documents  
15      to you en camera.

16               THE COURT: Okay. Are these --  
17      because that was a separate issue I wanted to  
18      address, which is the documents you raised which  
19      I think that the Defendant's side believes would  
20      have bearing on some of the decisions I need to  
21      make with regard with to the pending motions.  
22      These are documents that have been produced to  
23      the defense but are just subject to some prior  
24      agreement with regard to confidentiality?

1 MS. KHACHATOURIAN: Yes, Your  
2 Honor. They were produced to us and produced  
3 under the local rule that they would be produced  
4 to us AEO, attorneys eyes only. And I wanted to  
5 be considerate of the Court and of counsel.  
6 It's always annoying when people start blurting  
7 out AEO stuff in open court.

8 THE COURT: I'm not sure why the  
9 request to submit them en camera or frankly why  
10 either side couldn't submit them if I felt that  
11 they might be helpful.

12 MS. KHACHATOURIAN: Your Honor,  
13 I'm more than happy to submit them to you under  
14 seal.

15 THE COURT: Okay. All right.

16 MS. KHACHATOURIAN: That's not a  
17 problem at all.

18 THE COURT: All right. Let me get  
19 the Plaintiff's take on that on whether I could  
20 decide at least the threshold questions on the  
21 Rule 41 motion even if I was inclined to wait on  
22 the Third Circuit issue?

23 MR. SCHOENHARD: As a general  
24 matter, yes, Your Honor, I don't see any reason

1        why you could not. And in fact, I think for the  
2        purpose of Rule 41(d), the relevant time point  
3        is at the time of the filing of the complaint  
4        that is now complained of as part of the Rule  
5        41(d) motion. Here I don't actually believe  
6        there is any legitimate dispute as to whether at  
7        the time of the filing of the complaint here  
8        Contour IP holding was, in fact, the patent  
9        owner of the two patents in suit or that iON  
10       Worldwide, Inc. was the exclusive licensee of  
11       the patents in suit. I'm happy to provide Your  
12       Honor with the license agreement, which I  
13       believe is the primary document that opposing  
14       counsel is referring to, if that would aid you  
15       in your consideration.

16                THE COURT: Okay.

17                MR. SCHOENHARD: But I believe  
18        that anything that has happened since then would  
19        ultimately not be directly relevant to the Rule  
20        41(d) issue, which is tied to whether the newly  
21        filed complaint was properly brought or was in  
22        some way duplicative.

23                THE COURT: Okay. What I'm going  
24        to do is I'll issue a short oral order after our



1       hearing today that will call for either side in  
2       essence to provide -- and I'm looking for  
3       focused, you know, documents -- to provide any  
4       information that they believe would be relevant  
5       to kind of the limited question as to the status  
6       of relevant entities as it relates to the  
7       pending motions. And I'll frame that out in the  
8       oral order so there will be a little more  
9       guidance than I just gave off the cuff there and  
10      ask you to do that in a couple of days so that  
11      I'd have at least what either side believes may  
12      be relevant additional documentation that I  
13      might not need ultimately to be able to resolve  
14      those motions.

15                   MR. SCHOENHARD: Thank you, Your  
16      Honor. I expect that on our side where some of  
17      this confusion has laid we should be able to  
18      provide both that as well as a status update  
19      that should resolve the issues going forward in  
20      just a few days time.

21                   THE COURT: Okay. All right. So  
22      I'll issue a short oral order with regard to  
23      that issue and we can move on from there.

24                   MR. SCHOENHARD: Thank you, Your

1 Honor.

2 THE COURT: Thank you. With  
3 regard to the schedule, what I would next do is  
4 to first is, again, the assumption here is that  
5 this is a schedule that I would enter as of the  
6 end of this week beginning of next. Now, I know  
7 there's a dispute about relevant dates in the  
8 schedule which make up most of the disputes and  
9 the gist of that is should we have a schedule  
10 entered now or should we have a schedule that  
11 enters in essence after the IPR proceeding has  
12 concluded at the PTAB. Because the idea here is  
13 that we'd be entering a schedule now, the  
14 Plaintiff's dates would be submitted as part of  
15 this order, but I've also obtained from Chief  
16 Judge Stark's chambers some additional dates as  
17 to certain hearings that would have to occur  
18 before him that roughly match with what the  
19 Plaintiff's proposals were.

20 Let me give those to you so you  
21 can include them in the submission before I then  
22 ask you about other disputed issues with regard  
23 to the schedule. So with regard to the Markman  
24 hearing -- again, this is all if the Plaintiff's

1       proposal with regard to dates as to a schedule  
2       entered now will ultimately be adopted. The  
3       Markman hearing would occur on March 6th of 2017  
4       at 9 a.m. That's March 6th of 2017 at 9 a.m. A  
5       hearing on case dispositive and Daubert motions  
6       would occur on December 5th of 2017 at 1 p.m.  
7       That's December 5th of 2017 at 1 p.m. A  
8       pretrial conference would be held on March 9th  
9       of 2018 at 11:30 a.m. That's March 9th, 2018 at  
10      11:30 a.m. Trial would begin on April 9th of  
11      2018 at 9 a.m. That's April 9th, 2018 at 9 a.m.  
12      All of these hearings in Chief Judge Stark's  
13      courtroom. Okay. So those dates would be  
14      included in the submission as well.

15               Now, aside from that, if I'm  
16      right, but you could help me, reading the  
17      proposed scheduling order it looks like there's  
18      four other areas of dispute that don't relate to  
19      relative timing of dates. Let me tell you what  
20      I think they are and then if we go through those  
21      and if there's anything I missed, you can tell  
22      me if I'm missing something.

23               I think the first is on Page 4.  
24      That's really the dispute about whether

1 Defendant would need to produce sales figures as  
2 of the date of the second initial disclosures in  
3 Subparagraph B there. I think that's the first  
4 issue that's disputed. That is a part of Chief  
5 Judge Stark's patent procedures that the  
6 Defendant does make that submission at that  
7 time. Is there anything the Defendant wants to  
8 say as to why they think that's not appropriate  
9 in this case?

10 MS. KHACHATOURIAN: Your Honor,  
11 simply put, since these claims are before the  
12 PTAB right now, GoPro's position is is that if  
13 there is a schedule and you adopt Plaintiff's  
14 dates, that GoPro shouldn't be put to the burden  
15 of producing sales information, particularly  
16 since the fact that the PTAB instituted a review  
17 is pertinent to willfulness, because obviously  
18 we had an objectively reasonable basis to  
19 believe we didn't infringe if the PTAB  
20 instituted. So it's GoPro's position consistent  
21 with everything else that in light of the PTAB  
22 proceedings, GoPro shouldn't be put to that  
23 burden. And particularly since during this  
24 hearing Plaintiff did say that, you know,

1       there's certain of the aspects of the case they  
2       wouldn't push, damages should be part and parcel  
3       of that. I don't know how you peel it all off.  
4       And so we were just seeking to defer that  
5       burden.

6                   THE COURT: Should the Plaintiff  
7       not have to include his damages theory or model  
8       in its first disclosure too?

9                   MS. KHACHATOURIAN: That would be  
10      perfectly fine by us, Your Honor, because we  
11      don't think the case should move forward.

12                  THE COURT: Okay. Is there  
13      anything the Plaintiff wants to say on that, Ms.  
14      Keller?

15                  MS. KELLER: Yes, Your Honor. So  
16      I think this issue is intertwined with what you  
17      also see in Paragraph 8 as it relates to  
18      bifurcation generally of discovery for  
19      willfulness and damages. And Plaintiff's  
20      position is very simple. The standard practice  
21      in this Court, after a long thought out review  
22      of the default standard for discovery, was to  
23      include sales figures for the accused products  
24      early on so that Plaintiffs can make an educated

1 decision as to proceeding in the case and also  
2 to facilitate ADR in this case.

3 We don't -- let me take a step  
4 back. As you heard in the argument earlier, the  
5 same products are accused for the seven or eight  
6 claims that will go forward, so it only makes  
7 sense to proceed on a normal schedule as is  
8 typical in this court as to sales figures if  
9 we're going to proceed with a schedule. We  
10 don't understand, quite frankly, how willful  
11 infringement relates to this initial disclosure  
12 of sales figures and what the basis is for  
13 Defendant's argument that the two are  
14 intertwined. I think the Court's general  
15 process for not bifurcating at this point  
16 damages and willfulness from the normal course  
17 should also adhere in this case.

18 THE COURT: Okay. Thank you. The  
19 second issue was the request for bifurcation,  
20 which I suppose is also related to the request  
21 in Subparagraph B(2). Ms. Khachatourian, is  
22 there anything you want to add about why the  
23 Defendant's side thinks this case is a good  
24 candidate for bifurcation when it's not the norm

1 in Chief Judge Stark's cases?

2 MS. KHACHATOURIAN: Yes, Your  
3 Honor. This is, in fact, an extraordinarily  
4 unusual case, given all the open issues, not  
5 just with the PTAB but with ownership issues,  
6 license issues, who owns what. And therefore,  
7 in addition to the willfulness component that we  
8 discussed and the other issues I raised, I'd  
9 also raise that given all the open issues, until  
10 those are resolved it would make sense to  
11 bifurcate so as not to put the burden onto GoPro  
12 to participate in discovery that ultimately may  
13 be unnecessary.

14 THE COURT: And while I have you  
15 up here, why don't I ask you about what I  
16 thought were the other two issues that remain,  
17 which are on Page 5 of the scheduling order, a  
18 dispute about requests for admission and then  
19 probably more substantively, a dispute about  
20 deposition hours, which I think has some bearing  
21 on the issue of Contour LLC that was mentioned  
22 in the letter, but is there anything you want to  
23 add as to either of those two issues?

24 MS. KHACHATOURIAN: Your Honor, we

1       just think that the discovery request is  
2       excessive. 45 RFA's to one party appears  
3       excessive to us given the issues, particularly  
4       if there are certain issues the Plaintiff said  
5       they're not going to pursue while the PTAB is  
6       pending. With respect to the depositions, they  
7       want 70 hours of GoPro. We're just one party.  
8       I mean, that's 10 depositions. It's also  
9       unclear who the parties are. For example, you  
10      know, CIPH, if we were to take discovery, there  
11      would be some corporate formation and other  
12      things we would obviously pursue, but Contour  
13      LLC is the one who invented the patents,  
14      produced the product and all the rest of it.  
15      And then we presumably, if iON remains in the  
16      case, and again that is still unclear, we are  
17      going to want to depose them if they are the  
18      ones now manufacturing Contour's products. And  
19      so they shouldn't get the same amount of hours  
20      we have. They should get less. It's excessive  
21      to have 10 depositions in a simple case like  
22      this with only two patents where the patents are  
23      so related. I mean, that puts an extraordinary  
24      burden on GoPro and its employees.



1                   THE COURT: Was there some -- I  
2                   thought, maybe I was wrong, but I thought some  
3                   of the back and forth about maybe the request  
4                   for 70 hours was because you also intended to  
5                   consider Contour LLC as a party. And so the  
6                   idea was we think they should be treated as a  
7                   party and therefore we need more?

8                   MS. KHACHATOURIAN: Correct. That  
9                   is correct. And also, you know, we obviously  
10                  would take depositions of prior artists and  
11                  other more typical third parties that CIPH would  
12                  not. I mean technically CIPH is a  
13                  non-practicing entity. They are a holding  
14                  company for IP assets. So the burden on  
15                  discovery is presumably less on them than it  
16                  would be on us, and therefore it needs to be  
17                  proportional.

18                 THE COURT: As to the issue about  
19                  whether it's appropriate to treat Contour LLC as  
20                  a third party and let you guys pursue discovery  
21                  with Rule 45 or whether there's an argument as  
22                  to whether they should be treated as a party, if  
23                  I wasn't going to decide that issue today  
24                  because I don't have anything before me about

1        what the law would be on that, I can still make  
2        a decision about whether or not 70 or 35 hours,  
3        70 hours for both sides or 35 and 70 is  
4        appropriate?

5                    MS. KHACHATOURIAN: Presuming that  
6        I believe in our request we stated expert and  
7        third parties would be exempted, so so long as  
8        those, those third parties aren't included,  
9        which includes Contour LLC where we would get  
10       additional time, I would agree with Your Honor.

11                   THE COURT: That's not disputed,  
12       is it? I believe that's not disputed.

13                   MS. KHACHATOURIAN: Yeah, I don't  
14       believe it is.

15                   THE COURT: All right. Thank you.

16                   MS. KHACHATOURIAN: Thank you,  
17       Your Honor.

18                   THE COURT: Is there anything the  
19       Plaintiff wants to add about those two disputes,  
20       that is the dispute in Subparagraph C and E?

21                   MS. KELLER: Your Honor, as to the  
22       request for admission in Paragraph C, the  
23       dispute really is it's unclear -- and this may  
24       have been just been miscommunication between the

1 parties, whether these include requests for  
2 authenticity RFA's, which arguably tends to  
3 drive the number up a little bit higher, which  
4 is why we asked for the additional amount, I  
5 think we would be comfortable splitting it in  
6 the middle to be honest, Your Honor.

7 As to Paragraph E, Subpart 1, Your  
8 Honor, Plaintiff's request is for the Federal  
9 Rules, which is 10 depositions at seven hours a  
10 piece. We don't see justification to move away  
11 from that. It's practice in this Court. That's  
12 what's good for the goose is good for the  
13 gander, unless there's some abnormality in  
14 numbers of parties on each side where there's an  
15 adjustment made. But here a typical competitor  
16 case, you have 35 hours for Plaintiff's  
17 deposition of a Defendant and 70 seems very  
18 disparate. We're obviously going to be  
19 reasonable in the number of deposition hours we  
20 use, but to be limited to something less than  
21 the federal rules just seems extremely  
22 prejudicial to the Plaintiffs.

23 THE COURT: Okay. Thank you, Ms.  
24 Keller. I'll just ask the parties to, when you

1 submit the final proposed schedule, just leave  
2 these four disputes open as you have and I'll  
3 just -- I'll simply make decisions on the  
4 proposed form itself.

5 Did I miss any other scheduling  
6 related disputes that the parties are aware of?  
7 I see both sides shaking their head no and a  
8 chance to tell me I'm wrong. Okay. Thank you.  
9 Let me ask you then, before I just turn back to  
10 the issue on ADR for a minute, are there any  
11 other issues that don't relate to the motions  
12 which we've talked about in some detail, that  
13 don't relate to schedule disputes, but that are  
14 the kinds of issues where the parties would say,  
15 Judge, this isn't really ripe for decision now,  
16 but it's an issue that if the case moves forward  
17 or when it moves forward it's going to be an  
18 issue that the parties are going to be disputing  
19 and it's probably a good idea to make the Court  
20 aware of it now so that you're familiar with the  
21 fact that this is likely to come up in the  
22 future and it's a pretty important issue? Is  
23 there anything like that from the Plaintiff's  
24 side that we haven't already discussed today

1       that the Plaintiff would want to mention, Mr.  
2       Schoenhard?

3                   MR. SCHOENHARD:   None of which  
4       we're immediately aware, Your Honor.

5                   THE COURT:   Okay.   We did cover a  
6       lot.   On the Defendant's side, is there anything  
7       that falls into that category?

8                   MS. KHACHATOURIAN:   Nothing that I  
9       haven't already discussed, Your Honor.

10                  THE COURT:   Okay.

11                  MS. KHACHATOURIAN:   Thank you.

12                  MR. BLUMENFELD:   Your Honor, I  
13       should have raised this earlier, one scheduling  
14       thing.   It's a small thing.   If we go forward  
15       with the Plaintiff's schedule, the Markman  
16       hearing is about a month later than the parties  
17       had proposed and I would hope that we would be  
18       free to move the briefing a little.   And the  
19       main reason I raise that is because we had the  
20       second round of briefs due on January 6th under  
21       their proposal, which isn't perfect for a lot of  
22       reasons.   And so if we could get the briefs in,  
23       in a month before the Markman hearing, that  
24       would be helpful, I think, to both sides.

1                   THE COURT: Right. So the idea is  
2                   because we're moving the Markman back at least a  
3                   month from when you expected, it's not going to  
4                   effect the simplification issue because it's  
5                   actually moving it back. Just to give the  
6                   parties a little more breathing space around the  
7                   holidays, if the parties can jointly agree to  
8                   revised briefing dates or otherwise revised  
9                   claim construction dates that push things back  
10                  slightly because of the new Markman hearing  
11                  date, that's fine, just go ahead and include  
12                  those revised dates in what you submit to me on  
13                  Friday. Also if you could resolve Subparagraph  
14                  C, why don't you go ahead and do that so I just  
15                  have to make those decisions on that, that is,  
16                  on the issues with regard to request for  
17                  admission. I'll just make the decisions on the  
18                  remaining three issues assuming they are the  
19                  ones that are live.

20                 Okay. With that said, let me just  
21                 say a word about ADR. And I know some of this  
22                 may depend on one, whether the case moves  
23                 forward, but what I always like to do at least  
24                 at the initial scheduling conference is to ask

1 both sides their view as to when in the history  
2 of the case is the first instance where the  
3 Plaintiff and/or the Defendant believe that the  
4 Court could actually make substantive progress  
5 with the parties in terms of discussing the  
6 issue of settlement. Sometimes parties tell me  
7 that it would probably need to happen at least  
8 after initial disclosures are completed.  
9 Sometimes the parties say it's the kind of case  
10 where we would need to have a Markman order on  
11 disputed terms to really be able to assess  
12 merits by way of settlement. Sometimes the  
13 parties say something different. If I asked  
14 that to the Plaintiff's side, what's the first  
15 time Plaintiffs believes that progress could be  
16 made in terms of an initial call with regard to  
17 ADR?

18 MR. SCHOENHARD: Your Honor, the  
19 Plaintiffs are open to resolution of this  
20 dispute at any time, frankly. I expect that  
21 given the questions that have been raised by  
22 GoPro in this case about the ownership issues,  
23 although, again, I don't believe ownership is a  
24 dispute, but the status of the license with

1       respect to iON, I would expect that it would  
2       behoove the parties to wait until after that is  
3       resolved before burdening the Court's resources  
4       and moving forward with ADR. But at that point  
5       forward the Plaintiffs are prepared to proceed  
6       and would happily find a good resolution.

7               THE COURT: Okay. From the  
8       Defendant's side?

9               MS. KHACHATOURIAN: Your Honor,  
10       while GoPro is always open to resolution,  
11       opposing counsel is correct. Until the status  
12       of ownership and the remaining corporate issues  
13       are resolved, GoPro doesn't see an immediate  
14       benefit. They need to be speaking to the people  
15       who have authority and from GoPro's perspective,  
16       that's unclear right now, particularly since  
17       there is a dispute between the two Plaintiffs.

18              THE COURT: Okay. All right.  
19       Well, what I'll do is I won't set an initial ADR  
20       call in the schedule for now. It's clear to  
21       me that at least some number of case events  
22       and/or party discussions have to happen before  
23       we can probably make meaningful progress there.  
24       I'll just tag it as a case that as we go along



1 I'll need to follow up with the parties on that  
2 front at some point in the future. Okay.  
3 Before I leave you, is there anything else we  
4 need to take up at this time from the  
5 Plaintiff's perspective?

6 MR. SCHOENHARD: No, Your Honor.

7 THE COURT: Okay. And from the  
8 Defendant's perspective?

9 MS. KHACHATOURIAN: No, Your  
10 Honor.

11 THE COURT: All right. Counsel  
12 and out of town clients, I wish you safe  
13 travels. I thank everybody for your  
14 presentations today. Look forward to getting a  
15 revised schedule on Friday. I'll issue a short  
16 oral order with respect to the additional  
17 submissions and we'll make a decision about the  
18 entry of a schedule in short order. Okay.  
19 Thank you. Court will stand in recess.

20 (End at 4:04 p.m.)  
21  
22  
23  
24

1 State of Delaware )  
2 )  
New Castle County )

3  
4  
5 CERTIFICATE OF REPORTER  
6

7 I, Stacy M. Ingram, Certified Court Reporter  
8 and Notary Public, do hereby certify that the  
9 foregoing record, Pages 1 to 123 inclusive, is a true  
10 and accurate transcript of my stenographic notes  
11 taken on April 19, 2016, in the above-captioned  
12 matter.  
13

14 IN WITNESS WHEREOF, I have hereunto set my  
15 hand and seal this 19th day of April 2016, at  
16 Wilmington.  
17

18  
19 /s/ Stacy M. Ingram

20 Stacy M. Ingram, CCR  
21  
22  
23  
24

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I, Andrew E. Russell, hereby certify that on May 31, 2016, this document was served on the persons listed below in the manner indicated:

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